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# Cowboy Capitalism or Welfare Ranching? The Public Lands Grazing Policies of the Bush Administration

Raymond B. Wrabley, Jr.\*

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## I. INTRODUCTION

In 2004, Larry Kudlow, former economic advisor to President Ronald Reagan, lauded new economic proposals from President George W. Bush as “another dose of cowboy capitalism.” The term “cowboy capitalism” was first used as a derogatory epithet by liberal domestic and European critics of Ronald Reagan’s efforts to rollback nearly fifty years of welfare-state policies. The term has since been embraced by advocates of low tax rates, deregulation, and free trade. According to Kudlow, Bush’s economic proposals reflect “market-oriented measures” that are “pro-growth, incentive-based, and investor—and owner—oriented,” and “clearly [reject] government planning and entitlement.”<sup>1</sup>

The ranching industry that produced the cowboy, however, has long had a heavy dose of government planning and welfare state subsidies, especially in public lands grazing. Some have even referred to it as cowboy socialism,

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1. Larry Kudlow, *Bush's Clear Economic Message: The President Nailed it During his Two-day Economic Conference*, National Review Online, <http://www.nationalreview.com/kudlow/kudlow2004-12211029.asp> (last accessed Dec. 21, 2004).

calling public lands ranching "an industry owned and operated by the U. S. Government."<sup>2</sup>

As the governor of Texas, home of the cowboy and cradle of the ranching industry, George Bush ran for President in 2000 as a cowboy capitalist. When he was sworn in as President in 2001, he had opportunities to advance cowboy capitalist principles by rolling back welfare state practices in public lands ranching and, in the process, to move forward on some of his campaign pledges to improve the health of the environment.

For six years, the Bush Administration headed up some public lands policy trails and left others not taken. President Bush appointed important land management personnel, proposed budgets and regulatory changes, issued strategic plans and environmental impact statements, and litigated issues in Court. After almost two terms, the Administration has established a record that can help answer the question: when cowboy capitalist ideology met the welfare ranching reality, how did each fare?

## II. GEORGE W. BUSH AS COWBOY CAPITALIST

Ronald Reagan spent almost two decades condemning the modern welfare state before he was elected President in 1980. In the speech that brought him national prominence in 1964 he said, "a government can't control the economy without controlling people. . . . [W]hen a government sets out to do that, it must use force and coercion to achieve its purpose. . . . [O]utside of its legitimate functions, government does nothing as well or as economically as the private sector of the economy."<sup>3</sup> Seventeen years later, in his first inaugural address as President, he said, "[i]t is no coincidence that our present troubles parallel and are proportionate to the intervention and intrusion in our lives that result from unnecessary and excessive growth of government. . . . In this present crisis, government is not the solution to our problem, government is the problem."<sup>4</sup> His first acts as President included freezing all hiring of federal employees, slashing government regulation of the oil and gas industry, and pushing massive cuts in spending on government welfare programs.

Reagan nurtured his image as a cowboy, campaigning in cowboy hat and boots, and riding his horse at "the ranch."<sup>5</sup> Critics that saw his economic

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2. Karl Hess, Jr., *Enviro-Socialism*, The American Enterprise Institute Magazine Online, [http://www.taemag.com/issues/articleID.16498/article\\_detail.asp](http://www.taemag.com/issues/articleID.16498/article_detail.asp) (last accessed July-Aug. 1995).

3. Ronald Reagan, Televised Address, *Address on behalf of Barry Goldwater: Rendezvous with Destiny* (Oct. 27, 1964) (available at <http://www.reaganfoundation.org/reagan/speeches/rendezvous.asp>).

4. Ronald Reagan, Address, *Inaugural Address* (U.S. Capitol, Jan. 20, 1981) (available at <http://www.reaganfoundation.org/reagan/speeches/first.asp>).

5. The famous 1980 "Reagan Country" campaign photo of Reagan in a cowboy hat is still available for purchase at [www.reaganfoundation.org/store/products.asp?subcat\\_id=10](http://www.reaganfoundation.org/store/products.asp?subcat_id=10). At the Reagan Ranch today, "The living room contains paintings of cowboys and Western landscapes . . . [t]he Reagans' branding iron hangs on a wall . . . [t]he master bedroom . . . closet still holds Reagan's cowboy boots,

proposals as a serious assault on the consensus institutions built during the Progressive Era and the New Deal quickly condemned "Reaganomics" as "cowboy capitalism." Mark Green wrote in 1982, "not only are the factual premises of Reagan's Cowboy Capitalism faulty, but its theoretical underpinning seems pretty speculative. . . . The nostrums of the 1920s, or even the 1950s, cannot fit the 1980s."<sup>6</sup> However, supporters of Reagan's policies and philosophy have come to embrace the term Cowboy Capitalism. Kudlow wrote that in 1980 "the U.S. embarked on 'cowboy capitalism' . . . policies of low tax rates, free trade, price stability and massive entrepreneurship." These policies led to "Schumpeterian gales of creative destruction" and "the widest profit margins in the world," and "attracted investment inflows from the four corners of the globe."<sup>7</sup> More recently, according to Kudlow, "The American model of 'cowboy capitalism' — of low tax rates, deregulation, contained inflation, and free trade — is producing unheard of wealth that is turning the have-nots into haves."<sup>8</sup>

Olaf Gersemann, in *Cowboy Capitalism: European Myths, American Reality*, argues that the superior adaptability of "cowboy capitalism" is among the factors that have contributed to America's "new productivity miracle" and its greater economic performance than Europe's "comfy capitalism" model.<sup>9</sup> James Glassman paraphrases Keynes in arguing that "cowboy spirits" account for greater economic growth and job creation in the United States than in Europe.<sup>10</sup> According to Gersemann, Reagan's cowboy capitalism represented "a paradigm shift" from the prior half-century, when the free market was considered the problem, and government the solution. The result of this shift was a "sweeping liberalization" of the economy as the government's influence on the economy was reduced. Specifically, taxes

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several hats, and a dozen or so shirts and jackets." Young America's Foundation, *The Home*, <http://reaganranch.yaf.org/tour/home.cfm>. (Last accessed April 1, 2008)

6. Mark Green, *Winning Back America* 29, 33 (Bantam Books 1982); See also Mark Green, *Reagan's Cowboy Capitalism*, *The Nation*, <http://www.thenation.com/doc/19810307/green> (Mar. 7, 1981); See e.g. Walter Adams & James W. Brock, *Dangerous Pursuits: Mergers and Acquisitions in the Age of Wall Street* (Pantheon Books 1989).

7. Kudlow is referring to the economist Joseph Schumpeter, who explained capitalism's dynamism as a "perennial gale of creative destruction." Schumpeter wrote, "[t]his process of Creative Destruction is the essential fact about capitalism. It is what capitalism consists in and what every capitalist concern has got to live in." See Joseph Schumpeter, *Capitalism, Socialism, Democracy*, 3<sup>rd</sup> ed, 1950, 85-86. Larry Kudlow, *Saddle Up with the Dollar: Cowboy Capitalism Will Take Care of the Greenback*, National Review Online, <http://www.nationalreview.com/kudlow/kudlow200411160821.asp> (Nov. 16, 2004).

8. Larry Kudlow, *Any Hedgehogs Running for President?*, National Review Online, <http://article.nationalreview.com/?q=MDdiOTg5NDk3OWQ2NzE5YTUzYTMyZjYzZmZTc=> (Mar. 13, 2007).

9. Olaf Gersemann, *Cowboy Capitalism: European Myths, American Reality* 32, 64 (Cato Inst. 2004).

10. Keynes wrote of the "spontaneous optimism" or "spontaneous urge to action" that animates many economic decisions. He described these as "animal spirits," and Glassman likens them to "cowboy spirits" in defending cowboy capitalism. See James K. Glassman, Speech, *U.S. Lessons for Economic Growth in Europe*, (German Marshall Fund of the U.S., Berlin, Ger., June 6, 2002).

were lowered, product markets deregulated, public enterprises privatized, welfare state regulations reduced, and the power of unions diminished.<sup>11</sup>

In his first State of the Union address in 2001, President Bush declared, "the growing surplus exists because taxes are too high and Government is charging more than it needs. The American people have been overcharged, and on their behalf, I am here asking for a refund. . . . [T]he surplus is not the Government's money; the surplus is the people's money."<sup>12</sup>

Bush's cowboy swagger was no surprise. He had campaigned as a cowboy capitalist, although he did not use that term.<sup>13</sup> In fact, he explicitly and repeatedly called himself a "compassionate conservative."<sup>14</sup> His conservatism was not the zealous anti-statism of some of his more libertarian advisors. He called for a greater federal role in education and the expansion of Medicare to include a prescription drug benefit for eligible seniors. In that first State of the Union he said, "[g]overnment has a role, and an important one."<sup>15</sup> When accepting his party's nomination six months earlier he asserted, "[b]ig government is not the answer, but the alternative to bureaucracy is not indifference."<sup>16</sup>

Yet, clearly, in his campaign speeches and documents, Bush expressed a basic commitment to the tenets of cowboy capitalism. In his made-for-campaign autobiography, *A Charge to Keep*, he wrote, "[w]e can now say, without question, that the belief that government could solve people's problems was wrong and misguided. . . . We must reduce the reach and scope of the federal government, returning it to its proper, limited role, and push freedom and responsibility back to the local government, to neighborhoods, and to individuals."<sup>17</sup> This message partially shaped the 2000 Republican Party Platform, which expressly valued "a reduced role for government, greater personal liberty, economic freedom, reliance on the market and de-

11. Gersemann, *supra* n. 9, at 43.

12. George W. Bush, Address, *Address Before a Joint Session of Congress on Administration Goals* (U.S. Capitol, Feb. 27, 2001) (available at <http://www.presidency.ucsb.edu/ws/index.php?pid=29643>).

13. On the back cover of Bush's 2000 campaign autobiography is a picture of a painting by W.H.D. Koerner that hung in Bush's office while he was Texas governor and currently hangs in the Oval Office. The painting is of men on horseback. Bush writes that in the first few months as governor of Texas he sent a memo to his staff: "When you come into my office, please take a look at the beautiful painting of a horseman determinedly charging up what appears to be a steep and rough trail. This is us." George W. Bush & Karen Hughes, *A Charge to Keep* 45 (William Morrow 1999). The White House website currently includes a photo gallery of President Bush in a cowboy hat "clearing brush" at his Crawford Ranch. The White House, *News and Policies*, [http://www.whitehouse.gov/news/releases/2002/08/images/20020809-1\\_ranch3-515h.html](http://www.whitehouse.gov/news/releases/2002/08/images/20020809-1_ranch3-515h.html) (Aug. 9, 2002). The White House also cooperated with the interesting history of Bush's Prairie Chapel Ranch. The White House, "The Bush Ranch", *Cowboys and Indians Magazine*, Dec. 2002 <http://www.cowboysindians.com/articles/archives/1202/bush.html> (March 25, 2008). Supporters have also embraced the cowboy image.

14. See e.g. Alison Mitchell, *Bush Draws Campaign Theme From More Than 'the Heart'*, N.Y. Times, [http://www.manhattan-institute.org/html/\\_nyt-bush\\_draws\\_campaign\\_.htm](http://www.manhattan-institute.org/html/_nyt-bush_draws_campaign_.htm) (June 11, 2000).

15. Bush, *supra* n. 12.

16. George W. Bush, Speech, *Nomination Acceptance Speech* (First Union Center, Phila., Pa., Aug. 3, 2000) (available at <http://www.gwu.edu/~action/bush080300.html>).

17. Bush & Hughes, *supra* n. 13, at 230.

centralized decision-making . . . rewarding creativity, hard work, tenacity, and a willingness to take risks . . . a steadfast commitment to open markets, to minimal regulations, and to reducing taxes that snuff out innovation.”<sup>18</sup> The Bush campaign asserted, “it’s clear that the old left-liberal order of social policy has collapsed in failure. . . . [G]overnment must replace antiquated laws that restrict opportunity, increase costs, and inhibit innovation.”<sup>19</sup>

In his second debate with Al Gore in 2000 Bush said, “I don’t believe in command and control out of Washington, D.C . . . . I don’t believe, like the Vice President does, in huge government. I believe in limited government.”<sup>20</sup> In the third debate he said, “I trust people. I don’t trust the federal government . . . . I don’t want the federal government making decisions on behalf of everybody.”<sup>21</sup> In an interview with CNN in 2000 he said, “I come from the school of thought that says by reducing marginal rates on the people who pay the taxes, you will enhance economic growth. . . . I don’t believe government creates wealth. . . . But government can create an environment in which capital moves freely.”<sup>22</sup>

Bush was especially critical of the energy and environmental regulations that he believed undermined economic growth. He called the strict regulation of the oil and gas industries a move toward “European-style socialism,” writing that “it seemed to me that elite central planners were determining the course of our nation.”<sup>23</sup> His alternative to government planning was free enterprise: “I believe in the free market, in good times and in bad. Government should not try to control the price of a commodity.”<sup>24</sup>

In 2001, as the new President of a government he did not trust, Bush was now responsible for a \$1.7 trillion annual federal budget, almost 3 million federal employees, over 800 executive agencies, tens of thousands of regulations, and government entitlement programs large and small.<sup>25</sup> In the West, he faced a century-old tradition of welfare ranching in which the fed-

18. CNN, *Republican Party Platform, 2000*, <http://www.cnn.com/ELECTION/2000/conventions/republican/features/platform.00/>.

19. *Id.*

20. Commission on Presidential Debates, *Debate Transcript: The Second Gore-Bush Presidential Debate* (Oct. 11, 2000) (TV broad., transcr. available at [http://www.debates.org/pages/trans2000b\\_p.html](http://www.debates.org/pages/trans2000b_p.html)).

21. Commission on Presidential Debates, *Debate Transcript: The Third Gore-Bush Presidential Debate* (Oct. 17, 2000) (TV broad., transcr. available at [http://www.debates.org/pages/trans2000c\\_p.html](http://www.debates.org/pages/trans2000c_p.html)).

22. Interview by Candy Crowley, CNN with George W. Bush, Pres. of U.S. (Aug. 30, 2000) (TV broad., transcr. available at [http://www.transcripts.cnn.com/chat/TRANSCRIPTS/0008\\_30/mn.01.html](http://www.transcripts.cnn.com/chat/TRANSCRIPTS/0008_30/mn.01.html) (accessed March 25, 2008)).

23. Bush & Hughes, *supra* n. 13, at 72.

24. *Id.* at 65.

25. See GPO, *Budget of the United States Government: Browse Fiscal Year 2001*, <http://www.gpoaccess.gov/usbudget/fy01/browse.html> (last updated Jan. 24, 2008); See U.S. Census Bureau, Federal Government Civilian Employment by State, <http://www.census.gov/govs/apcs/02federalstate.txt> (December 31, 2002). See La. St. U. Lib., *LSU Libraries Federal Agencies Directory*, <http://www.lib.lsu.edu/gov/fedgov.html> (last updated July 23, 2007).

eral government had granted ranchers legal entitlement to graze livestock on public lands.

### III. PUBLIC LANDS GRAZING

#### A. History

The public's lands, owned by the United States government, exceed 600 million acres, or about 28% of the land area of the country, mostly in the western states.<sup>26</sup> The federal government owns more than half the land in Alaska, Idaho, Nevada, Oregon, Utah, and Wyoming. The United States first acquired lands from cessions by the original thirteen states. In 1803, the Louisiana Purchase doubled the land area of the United States, adding enormous swaths of land between the Mississippi River and the Rocky Mountains, and from the Gulf of Mexico to the Canadian border. At the end of the Mexican War in 1848, the United States acquired the vast territory from Texas to the Pacific that would eventually become California, Nevada, Utah, most of New Mexico and Arizona, and parts of Colorado and Wyoming. In 1853, with the purchase from Mexico of what is now southern New Mexico and Arizona, the continental boundaries of the United States were complete.<sup>27</sup>

The presumption that these public lands would eventually be granted or sold to states or private parties prevailed throughout the Nineteenth Century, and Congress carried out land grants and sales under various Acts.<sup>28</sup> However, in response to political pressures at the turn of the century, Congress set aside millions of acres of public land as national parks, reserves, monuments, cemeteries, and historical preserves.<sup>29</sup> Much of the public land that was not set aside contained valuable resources like minerals, timber, forage, recreation, and wildlife habitat, and ranchers were not the only private parties that desired access.

Advocates of ranching on public lands argue that the practice has a 400-year heritage dating to the Spanish missions.<sup>30</sup> The raising of livestock on

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26. Federal lands amount to about 655 million acres in all 50 states, or about 28% of the lands of the 50 states. See table at [www.blm.gov/natacq/pls99/99pl1-3.pdf](http://www.blm.gov/natacq/pls99/99pl1-3.pdf).

27. The 1853 Gadsden Purchase. There were earlier cessions, seizures, and purchases of various lands, as well. See Phillip O. Foss, *Politics and Grass: The Administration of Grazing on the Public Domain* (U. of Wash. Press 1960).

28. The Homestead Act of 1862, 43 U.S.C. §§ 161-284 (repealed 1976); The 1873 Timber Culture Act, 17 Stat. 605 (1873); The 1877 Desert Land Act, 19 Stat. 377 (1877).

29. The 1872 Act Establishing Yellowstone National Park, 17 Stat. 32 (1872); The 1891 Forest Reserve Act, 26 Stat. 1095 (1891); The Antiquities Act of 1906, 16 U.S.C. §§ 431-433 (1906).

30. Richard L. Knight, *The Ecology of Ranching*, in *Ranching West of the 100<sup>th</sup> Meridian: Culture, Ecology, and Economics*, pg. 12 (R. L. Knight, W. C. Gilgert, & E. Marston, eds., Island Press (2002); Marc Stimpert, *Counterpoint: Opportunities Lost and Opportunities Gained: Separating Truth From Myth in the Western Ranching Debate*, 36 *Envtl. L.* 996 (2006).

the western range began as early as the 1870s.<sup>31</sup> In the quarter century following the Civil War, millions of cattle were moved across the southern plains and shipped to eastern slaughterhouses and markets. These famous cattle drives that crossed public lands in Kansas, Nebraska, New Mexico and Colorado fixed the cowboy at the center of Western mythology. According to Donahue, "cattle were a relatively efficient means of capturing a resource—grass—which would otherwise have gone to waste."<sup>32</sup>

Yet as more of the public domain was granted to homesteaders, cattlemen clashed with farmers on the "contested plains," and cattle country was pushed west.<sup>33</sup> Ranchers quickly spread over the open range. In 1860, cattle were still absent from the territories of Colorado, Wyoming, and Montana. Twenty years later, the census counted 1.8 million.<sup>34</sup> According to Cronon, "[e]verywhere, from Texas to Saskatchewan, the old buffalo range became ranchland. Bison gave way to livestock."<sup>35</sup> Steinberg called it "one of the most stunning transformations of a North American biome."<sup>36</sup>

"Cattle," according to Cronon, "helped ensure that the short grasses would continue their dominance of the western plains, and were consequently in some ways a force for stability and continuity in the landscape."<sup>37</sup> However, the "tragedy of the commons" scenario played out fairly quickly.<sup>38</sup> Overstocking and overgrazing of the public rangelands led to deteriorating range health as less productive, invasive species succeeded native forage plants. The cattle trampled riparian areas, compacted soil, and disrupted aquatic systems.<sup>39</sup> In Arizona, one observer noted in 1891 that the "range was as bare as slide rock."<sup>40</sup> Stockmen clashed as some attempted to monopolize public land by fence or by force. According to Stimpert,

31. Debra L. Donahue, *The Western Range Revisited: Removing Livestock From Public Lands to Conserve Native Biodiversity*, pg. 12 (U. of Oakl. Press 1999); See Terry G. Jordan, *North American Cattle-Ranching Frontiers: Origins, Diffusion, and Differentiation* (U. of N.M. Press 1993).

32. Debra Donahue, *Western Grazing: The Capture of Grass, Ground, and Government*, 35 *Envtl. L.* 737 (2005).

33. Ernest Osgood Staples, *The Day of the Cattlemen*, 35-36 (U. of Chi. Press 1957); Elliot West, *The Contested Plains: Indians, Goldseekers, and the Rush to Colorado*, pg. 329 (U. of Kan. Press 1998).

34. Karl Hess, *Visions Upon the Land: Man and Nature on the Western Range* 58 (Island Press 1992).

35. William Cronon, *Nature's Metropolis: Chicago and the Great West* 220 (W.W. Norton & Co. 1992); See also Andrew C. Isenberg, *The Destruction of the Bison: An Environmental History, 1750-1920* (Cambridge U. Press 2000); Edward Everett Dale, *The Range Cattle Industry* (U. of Oakl. Press 1930); Walter Prescott Webb, *The Great Plains*, pp. 239-240 (U. of Neb. Press 1959).

36. Ted Steinberg, *Down to Earth: Nature's Role in American History* 129 (Oxford U. Press 2002).

37. Cronon, *supra* n. 35, at 220.

38. See Garrett Hardin, *The Tragedy of the Commons*, 162 *Science* 1243-1248 (1968). Hardin argued that a herdsman grazing common property has an incentive to constantly add to the size of his herd since he receives all the benefits from the sale of each additional animal, but only bears a small cost of the additional overgrazing. The consequence of each herdsman pursuing his individual interest is the ruination of the commons by overgrazing.

39. Thomas Fleischner, *Ecological Costs of Livestock Grazing in Western North America*, 8 *Conserv. Biology* 629, 629-644 (1994); Jerry Holechek et al., *Natural Resources: Ecology, Economics, and Policy* 340, 347-348, 357 (Prentice Hall 2000).

40. Hess, *supra* n. 34, at 58.



"[f]ederal homestead and open range policies were a disaster for ranchers and rangeland alike . . . . Range wars and rangeland degradation were a direct consequence of these policies."<sup>41</sup> Yet by the end of the nineteenth century, the Supreme Court affirmed a right, or "implied license," of privately owned livestock to "run at large over the unenclosed lands of the United States and to feed upon the grasses."<sup>42</sup> In *Buford v. Houtz*, 133 U.S. 320 (1890), the Supreme Court, citing "the custom of nearly a hundred years," asserted that the public lands, "especially those in which the native grasses are adapted to the growth and fattening of domestic animals, shall be free to the people who seek to use them, where they are left open and unenclosed, and no act of government forbids this use."<sup>43</sup>

At the turn of the century, managers of the forest reserves began issuing grazing permits to individual stockmen and charging grazing fees. In 1934, Congress ended open range grazing on the rest of the federal domain, partly in response to livestock industry lobbying. The Taylor Grazing Act ("TGA") authorized the Secretary of the Interior ("Secretary") to establish grazing districts on "vacant, unappropriated, and unreserved lands. . . . chiefly valuable for grazing and raising forage crops," and to withdraw these districts from "all forms of entry and settlement."<sup>44</sup> By withdrawing the lands from entry by homesteaders or other settlers, Congress implied that these lands were not suitable for cultivation and that grazing on the lands must be controlled.

The TGA sought to provide for the orderly management of grazing on public lands while protecting the health of the range, in part by giving preference for grazing permits to local ranchers that also owned adjacent land and water. The TGA authorized the Secretary to issue grazing permits in these districts and to assess a reasonable fee. The permits could not exceed ten years and were renewable at the discretion of the Secretary. It required that the initial allocation of grazing permits be based on livestock use in the five years prior to the enactment of TGA. The Secretary was also authorized to make rules to protect the land from "destruction or unnecessary injury," provide for its improvement, and limit the number of stock and the season of use. Finally, the TGA required the Secretary to "adequately safeguard" grazing privileges, although the privileges did not create "any right, title, interest, or estate in or to the lands."<sup>45</sup>

"[W]ith the passage of the [TGA], Congress created a valuable entitlement designed to protect individual ranchers and the livestock industry as a

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41. Stimpert, *supra* n. 30, at 996.

42. *Buford v. Houtz*, 133 U.S. 320 (1890). The Court held that because the government had not barred grazing on public lands it had implied that those lands may be freely grazed. This is not necessarily a grazing "right" but an implied license to graze.

43. *Buford v. Houtz*, 133 U.S. 320 (1890).

44. The Taylor Grazing Act, 43 U.S.C. §§ 315-316 (1934).

45. *Id.*

whole.”<sup>46</sup> Without TGA, local owners did not have exclusive use of the forage on the public lands and couldn’t legally bar nomadic sheepherders or small ranchers from making use of the forage. However, the Act essentially codified the status quo—grazing rights would be allocated to local owners of property and water rights.<sup>47</sup> In 1960, Congress required that the agencies manage national forest lands for “multiple use,” with grazing among the authorized uses.<sup>48</sup> In 1976, more than forty years after ending open range grazing policies, Congress ended the long history of public lands disposal (except in Alaska), declaring that public lands would be “retained in Federal ownership,” and reiterated that they would be managed on a multiple use and sustained yield basis through land use plans developed with public involvement.<sup>49</sup> Regarding the range, Congress declared livestock grazing a “principle or major use,” but noted “a substantial amount of the Federal range land is deteriorating in quality.”

Congress also promulgated management objectives that reflected the environmental concerns of the 1970s.<sup>50</sup> The Federal Land Policy and Management Act (“FLPMA”) asserted that increased federal investment in range improvements could lead to “betterment of forage conditions with resulting benefits to wildlife, watershed protection, and livestock production.”<sup>51</sup> Congress authorized appropriations for “seeding and reseeding, fence construction, weed control, water development, and fish and wildlife habitat enhancement,” and exempted these range improvements from required environmental impact assessments. Finally, FLPMA established a policy under which the federal government would “receive fair market value of the use of the public lands and their resources *unless otherwise provided for by statute*,” and authorized the Secretary to cancel grazing permits in various circumstances.<sup>52</sup>

Two years later, Congress returned to the issue and found that “vast segments of the public rangelands” remained in “unsatisfactory condition,”

46. Stimpert, *supra* n. 30, at 509.

47. Christopher M. Klyza, *Who Controls Public Lands? Mining, Forestry, and Grazing Policies, 1870-1990*, pg. 115 (U. of N.C. Press 1996).

48. The Multiple Use Sustained Yield Act of 1960, 16 U.S.C. §§ 528-531 (1960). According to Hays, by the early twentieth century, grazing had become “the primary use of the forests, far more important than lumbering.” Samuel P. Hays, *Conservation and the Gospel of Efficiency: The Progressive Movement, 1890-1920* 49 (U. of Pitt. Press 1969).

49. The Federal Land Policy Management Act, 43 U.S.C. §§ 1701, 1702(c), (h) (1976) (defining sustained yield as maintenance into perpetuity of a high-level annual output of renewable resources, and multiple use management as utilization of the various resources in a balanced and diverse manner to meet the present and future needs of the American people).

50. *Id.* at § 1701(a)(8) (requires that public lands be managed to: protect the quality of “air and atmospheric, water resource, and archaeological values”; where appropriate, “preserve and protect certain public lands in their natural condition . . . [so as to] provide food and habitat for fish and wildlife and domestic animals; . . . provide for outdoor recreation.”).

51. Federal Land Policy and Management Act, 43 U.S.C. § 1701 (1976).

52. *Id.* at §§ 1701-1785; See The National Forest Management Act, 16 U.S.C. § 1600 (1976); See also Joseph Ross, *FLPMA Turns 30: The Bureau of Land Management Also Celebrates its 60<sup>th</sup> Birthday*, 28 Rangelands 16 (2006).

produced less than their potential for livestock, recreation, and habitat benefits, and were at high risk of further degradation of soil, water, forage, recreation, and esthetic resources.<sup>53</sup> However, Congress continued to favor scientific management of the range, asserting that the unsatisfactory conditions “can be addressed and corrected by an intensive public rangelands maintenance, management, and improvement program.”<sup>54</sup> The Public Rangelands Improvement Act of 1978 (“PRIA”) committed the federal government to preventing “economic disruption and harm to the western livestock industry” through improved management, increased appropriations, support for grazing stewardship programs, and a new formula for calculating grazing fees.<sup>55</sup> The PRIA continued the national policy of federal management of grazing districts on public lands, public investment in maintenance and improvements, and government control over livestock stocking rates.

In the almost thirty years since the passage of the PRIA, pitched battles have been fought over how to allocate public land among conflicting users, regulate ranching activity, and charge ranchers fees for the use of the public land. The most significant policy reform effort since the PRIA was the Clinton Administration’s “Rangeland Reform 94,” spearheaded by Bruce Babbitt. Prior to his appointment as Clinton’s Secretary of the Interior, Babbitt suggested that the federal government scrap traditional multiple-use management. Instead, he said, “we must recognize the new reality that the highest and best, most productive use of western public land will usually be for public purposes—watershed, wildlife, and recreation.”<sup>56</sup> As Secretary of Interior, Babbitt initially tried to reform the grazing permit system through the legislative process, by raising fees and creating standards and incentives for more ecological land management practices.<sup>57</sup> Ranching interests and allies of the ranching industry in Congress, especially from western states, criticized and resisted the reform proposals, and succeeded in killing these legislative efforts in the Senate. Babbitt managed to push the reforms through the administrative process, but only after an arduous effort to accommodate ranchers.

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53. The Public Rangelands Improvement Act of 1978, 43 U.S.C. §§ 1901-1908 (1978).

54. Public Rangelands Improvement Act of 1978, 43 U.S.C. § 1901(a)(4) (1978). “Scientific management” refers to government mandates and regulations based on the recommendations of government-employed range biologists and other scientists regarding the appropriate levels of grazing, seeding, and weed control. An alternative to scientific management is free-market management. For a fuller discussion of “scientific management” of public lands see Robert H. Nelson, “Rethinking Scientific Management: Brand-New Alternatives for a Century-Old Agency,” in *A Vision for the US Forest Service: Goals for the Next Century*, Roger Sedjo, ed. Wash. DC, Resources for the Future, 2000.

55. *Id.*

56. Joan Hamilton, *Babbitt’s Retreat*, Sierra, [http://findarticles.com/p/articles/mi\\_m1525/is\\_n4\\_v79/ai\\_15518168](http://findarticles.com/p/articles/mi_m1525/is_n4_v79/ai_15518168) (July-Aug. 1994).

57. Scott Nicoll, *The Death of Rangeland Reform*, 21 J. Envtl. L. & Litig. 47 (2006); Karl N. Arruda & Christopher Watson, *The Rise and Fall of Grazing Reform*, 32 Land & Water L. Rev. 413 (1997).

The final rule issued by the Administration, which took effect in August 1995: (1) expanded public participation in rangeland management decisions; (2) gave the United States title to all permanent grazing-related improvements constructed on public lands; (3) allowed a permittee to stop grazing activity on an allotment for up to ten years without giving up the grazing permit; and (4) established standards (or "fundamentals") of rangeland health to preserve or restore healthy grazing lands.<sup>58</sup> The rule also changed the definition of "grazing preference" to give a permittee priority for receiving a grazing permit, but not for a specific quantity of forage as the regulations had previously provided.<sup>59</sup> Finally, the rule clarified the permit eligibility criteria by eliminating the requirement that a permit holder be "engaged in the livestock business."<sup>60</sup>

Ranchers and their allies sued the Administration, claiming that the new grazing rules were inconsistent with the Secretary's statutory obligations. In *Public Lands Council v. Babbitt*, 529 U.S. 728 (2000), the Supreme Court ruled unanimously that Babbitt acted within his statutory authority when he issued the new rules.<sup>61</sup> The Administration had not appealed a ruling by the Tenth Circuit striking down conservation use permits as violating the TGA.<sup>62</sup>

The battles of the 1990s, however, did not fundamentally alter the established policy of giving preference to grazing uses on public land. The federal government continued to invest in range maintenance and improvements, require permittees to actively graze the allotments, and dictate the total number of livestock. This policy approach is consistent with other "command and control" (or standards and enforcement) statutes, under which government mandates the means by which private businesses meet government-formulated standards, and imposes penalties upon violations.<sup>63</sup> It also reflects the Progressive "vision upon the land," which makes resource development and allocation decisions based on scientific principles applied by disinterested experts. According to Karl Hess, the Progressive multiple-use land management approach is rooted in an almost unlimited

58. 43 C.F.R. pts. 1780, 4100 (1995).

59. Compare 43 C.F.R. 4100.0-5 (1995) to 43 C.F.R. 4100.0-5 (1994). The old rules defined grazing preference in terms of a quantity of forage, allowing a rancher to harvest a particular amount of forage with a specific number of cows. The new rules defined "preference" as having a priority over other applicants for a permit renewal or for any additional forage on the allotment that might become available.

60. Compare 42 C.F.R. 4110.1(a) (1995) to 43 C.F.R. 100.1(a) (1994).

61. *Pub. Lands Council v. Babbitt*, 529 U.S. 728 (2000).

62. *Pub. Lands Council v. Babbitt*, 167 F.3d 1287 (10th Cir. 1999) (ruling that a grazing permit holder must graze the allotment, and grazing permits could not be issued for "conservation use" (non-grazing) purposes as the Clinton-Babbitt rule provided). By not appealing to the Supreme Court, the Clinton Administration gave up conservation use permits.

63. See Eric Orts, *Reflexive Environmental Law*, 89 Nw. U. L. Rev. 1227, 1227-1340 (1995); See Howard Latin, *Ideal and Real Regulatory Efficiency: Implementation of Uniform Standards and 'Fine-Tuning' Regulatory Reforms*, 37 Stan. L. Rev. 1267 (1985); See The Clean Air Act, 42 U.S.C. 85 (1990); See The Clean Water Act, 33 U.S.C. 1251 (1972).

"faith and confidence in the powers of technical and social planning and engineering."<sup>64</sup> Hays describes this Progressive conservation vision as the gospel of efficiency: "[t]he crux of the gospel of efficiency lay in a rational and scientific method of making basic technological decisions through a single, central authority."<sup>65</sup> The policy is also reflective of interest-group liberalism, in which organized private interests play a significant role in determining and administering the policies that affect them.<sup>66</sup> Policies surrounding grazing have long been a subject of controversy due to their environmental consequences, economic impacts, and prioritization of ranching activity above other uses of the public domain.

### B. *Environmental Controversies*

In 1994, the journal *Conservation Biology* devoted an issue to "Cows and Conservation Biology," and the editor acknowledged that "we can expect a clash of expert opinions on the livestock grazing issue."<sup>67</sup> This clash is fueled by contradictory activist polemics, conflicting scientific claims, and protracted legal battles.

According to Stimpert:

[T]he scientific literature conclusively demonstrate[s] that moderate, controlled livestock grazing is beneficial, compatible with arid rangeland ecosystems, and sustainable. . . . Ranchers maintain an important cultural heritage, contribute to the economy, produce food for the nation, preserve the open Western landscape, and prevent environmentally and aesthetically damaging land use. . . . [T]he idea that the ranchers have little to no legal right to graze is a falsehood created by those who wish to eliminate grazing.<sup>68</sup>

Law professor Debra Donahue counters: "[t]he conclusion is inescapable: much of the range science literature, and many agency publications, are propaganda or apology, not sound science or management advice."<sup>69</sup> According to Donahue, livestock grazing "can wreak havoc on the envi-

64. Hess, *supra* n.34, at 119. Progressive refers to the early twentieth century Progressive Era philosophy espoused by Theodore Roosevelt and Gifford Pinchot, that the nation's resources should be used responsibly, managed by government on the basis of scientific principles, and not on the basis of the greed of big industrialists or the corruption of political bosses.

65. Hays, *supra* n. 48, at 271.

66. Theodore J. Lowi, *The End of Liberalism: The Second Republic of the United States*, pp. 71-79 (2nd ed., W.W. Norton & Co. 1969). Robert Nelson argues that Progressivism and interest-group liberalism are generally anti-thetical, and that public lands policies frequently have Progressive scientific management "window dressing" over the interest group politics reality. See Robert H. Nelson, *Public Land and Private Rights: The Failure of Scientific Management* (Rowman and Littlefield 1995); See also Klyza, *supra* n. 44.

67. Reed F. Noss, *Cows and Conservation Biology*, 8 *Conserv. Biology* 615 (1994).

68. Stimpert, *supra* n. 30, at 518-519, 529.

69. Donahue, *supra* n. 32, at 727.

ronment" and cause "irreversible" ecological damage.<sup>70</sup> She argues that grazing is the "least valuable" commercial use of public lands, that few western communities are economically dependent on grazing, and that a particular "ranching way of life" is not identifiable.<sup>71</sup>

Conservation biologists agree that heavy grazing, especially in arid landscapes, has a detrimental impact on the environment. According to Reed Noss, grazing in the American West:

...has contributed to the loss of native vegetation, invasions by alien plants, decline of native fisheries due to dewatering of streams for irrigation and degradation of riparian zones, eradication of native carnivores and prairie dogs, diseases in native herbivores, and major changes in fire frequency, hydrology, soils, and other ecosystem properties. Many conservationists claim that livestock grazing has done more damage to the native biodiversity of western North America than all the chainsaws and bulldozers combined.<sup>72</sup>

However, some ranching advocates and range ecologists argue that light to moderate grazing has a positive environmental impact. In a report prepared for the federal government, Resource Concepts, Inc. argued that "the practice of grazing rangelands is possibly the best example of low-input agriculture known today, requiring very little fossil fuel when compared to many other forms of agriculture. Livestock are turned out to graze, rotated from one grazing unit to another, or herded through an area while harvesting forage. These animals convert natural forage into red meat protein for human consumption, along with other products. . . . [M]anaged grazing helps to sustain native plant communities and wildlife populations."<sup>73</sup> According to Holechek, "[i]n the semi-arid shrubland ranges of the Southwest and intermountain regions, light grazing can be a useful means of improving forage production."<sup>74</sup> The problem, he argues, is that government programs, especially cost subsidies, "encourage ranchers to maximize livestock numbers on private and public rangelands, often at the expense of land conservation."<sup>75</sup>

70. *Id.* at 723, 726.

71. *Id.* at 723, 728, 730.

72. Noss, *supra* n. 67, at 618. See also Fleischner, *supra* n. 39; See also Johanna H. Wald, *Beleaguered Rangelands Signify Policy Failure*, 11 Forum for Applied Research and Public Policy 34 (1996).

73. Resource Concepts, Inc., *Executive Summary: Nevada Grazing Statistics Report and Economic Analysis for Federal Lands in Nevada* 12, <http://agri.state.nv.us/graze/PDF/Executive%20Summary.pdf> (Mar. 26, 2001).

74. Holechek, *supra* n. 39, at 347; See also Jerry Holechek et al., *Moderate and Light Cattle Grazing Effects on Chihuahuan Desert Rangelands*, 56 J. of Range Mgt. 133 (2003).

75. Holechek, *supra* n. 39, at 360.

*C. Economic Controversies*

Cost subsidies are central to a second major controversy and serve as the basis for criticism that grazing on public lands is a welfare entitlement for wealthy and corporate ranchers. Currently, approximately 20,000 permit holders graze millions of livestock on more than 260 million acres of public land: over 30,000 allotments exist, ranging in size from a few acres to hundreds of thousands of acres.<sup>76</sup> According to the Government Accounting Office ("GAO"), federal agencies spent \$144.3 million in 2004 to support grazing. Grazing permits and leases generated about \$21 million, less than one-sixth of expenditures to manage grazing.<sup>77</sup> In 1978, PRIA set the Bureau of Land Management and Forest Service fee formulas, which extended under Executive Order 12548. According to the GAO, the purpose of the fee is to "account for livestock industry prices and to support ranchers and the western livestock industry," and "not primarily to recover the agencies' expenditures or to capture the fair market value of the forage."<sup>78</sup>

In early 2007, the federal government announced a reduction in grazing fees, prompting Greta Anderson, Range Restoration Director for the anti-grazing Center for Biological Diversity, to say, "[a] small number of Western livestock operators, producing less than three percent of the beef we eat, pay less per month to feed their cows than it costs to feed a hamster. Meanwhile those cows are befouling our rivers, accelerating erosion, and driving rare species toward extinction on lands that belong to the American people."<sup>79</sup> The anti-grazing Forest Guardians denounce the "wing-tipped welfare cowboys," pointing out that grazing permits on millions of acres of public lands are held by large energy companies, real estate developers, and other corporations. Grazing permits are held, for example, by Union Oil, Getty Oil, Texaco, Anheuser-Busch, John Hancock, and wealthy individuals such as Bill Hewlett, David Packard (of Hewlett-Packard), and Jack Simplot (founder of an agribusiness conglomerate and one of Forbes 500

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76. GAO Report, *Livestock Grazing: Federal Expenditures and Receipts Vary, Depending on the Agency and the Purpose of Fee Charged*, GAO-05-869, pp. 10, 12, <http://www.gao.gov/new.items/d05869.pdf> (Sept. 2005).

77. GAO Report, *Livestock Grazing: Federal Expenditures and Receipts Vary, Depending on the Agency and the Purpose of Fee Charged*, GAO-05-869, 5-6, <http://www.gao.gov/new.items/d05869.pdf> (Sept. 2005); See also GAO Report, *Rangeland Management: Profile of the Bureau of Land Management's Grazing Allotments and Permits*, GAO/RCED-92-213FS, <http://archive.gao.gov/d32t10/146906.pdf> (June 1992); See also GAO Report, *Rangeland Management: Profile of the Forest Service's Grazing Allotments and Permittees*, GAO/RCED-93-141FS, <http://archive.gao.gov/t2pbat6/149111.pdf> (Apr. 1993).

78. GAO Report, *Livestock Grazing*, *supra* n. 76, at 6-7.

79. Center for Biological Diversity, *Federal Government Lowers Cost of Public Lands Grazing For Livestock Owners: Cost Rises for Taxpayers*, <http://www.biologicaldiversity.org/swcbd/PRESS/grazing-fee-02-02-2007.html> (Feb. 2, 2007).

wealthiest individuals).<sup>80</sup> One recent study concluded that half of permit holders are “hobby” ranchers and not dependent on ranching income.<sup>81</sup>

The National Cattlemen’s Beef Association (NCBA) argues that the GAO “fails to account for costs and benefits of range management not measured on a balance sheet.”<sup>82</sup> The NCBA argues that, in addition to paying grazing fees, ranchers invest millions of dollars in range improvements. Ranchers’ financial investments and physical work on the range save taxpayers money by improving public rangelands without consuming tax money and the time of government employees. They also benefit the public by preserving open space and biodiversity.<sup>83</sup> Professor Richard Knight, in testimony before the Senate Public Lands and Forests Subcommittee, argued that ranching is the “oldest sustainable use of western lands,” and “more than any other justification, the timeless traditions of ranching legitimize its existence and continuation.”<sup>84</sup> According to Knight, subsidies sustain ranchers, who serve as stewards of the land, protectors of open space, and practitioners of a western culture and way of life worth preserving.<sup>85</sup>

#### IV. THE BUSH ADMINISTRATION: THE TRAILS TAKEN

Upon assuming the Presidency, among the myriad issues faced by Bush was the controversy over public lands grazing. The President’s “cowboy capitalist” ideology suggested that government planning and regulation of public land uses should give way to market-driven decisions. As an industry, public lands ranching is heavily regulated by the federal government. According to Hess and Holocheck, “the land and grass are federal property, planning and management are federal functions, and the workers—the 27,000 ranchers who own the livestock—are federally licensed, supervised, and subsidized. From the building of fences and watering holes to setting how, when, and where to graze, grazing on public lands is in every sense a command-and-control economy.”<sup>86</sup> A president cannot pursue an agenda or

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80. Forest Guardians, *Wing-Tipped Welfare Cowboys Ride the Range*, [http://www.fguardians.org/support\\_docs/factsheet\\_wing-tip-welfare-cowboys.pdf](http://www.fguardians.org/support_docs/factsheet_wing-tip-welfare-cowboys.pdf) (Jan. 21, 2006); William Kittredge, *Free Range*, vol. 209, pg. 16, *The New Republic*, 16-17 (Dec. 13, 1993).

81. Bradley J. Gentner & John A. Tanaka, *Classifying Federal Public Land Grazing Permittees*, 55 *J. of Range Mgt* 2 (2002).

82. Maggie Beal, *Contrary to GAO Report, Public Lands Grazing Provides Numerous Benefits* 30, <http://www.beefusa.org/uDocs/grazing293.pdf> (Jan.-Feb., 2006).

83. *Id.*

84. Sen. Subcomm. on Pub. Lands & Forests of the Comm. on Energy and Nat. Resources, *Ranchers as Keystone Species in a Healthy West*, [http://energy.senate.gov/public/index.cfm?FuseAction=Hearings.Testimony&Hearing\\_ID=1500&Witness\\_ID=4272](http://energy.senate.gov/public/index.cfm?FuseAction=Hearings.Testimony&Hearing_ID=1500&Witness_ID=4272) (Sept. 28, 2005). See also James H. Brown and William McDonald, “Livestock Grazing and Conservation on Southwestern Rangelands, 9 *Conservation Biology* 1646 (1995).

85. *Id.*; See also Jeremy D. Maestas, Richard L. Knight, & Wendell C. Gilgert, *Biodiversity Across a Rural Land-Use Gradient*, 17 *Conserv. Biology* 1425 (2003).

86. Karl Hess, Jr. & Jerry L. Holocheck, *Beyond the Grazing Fee: An Agenda for Rangeland Reform*, Cato Policy Analysis No. 234, July 13, 1995 at [www.cato.org/pubs/pas/pa-234.html](http://www.cato.org/pubs/pas/pa-234.html). Hess and



leave an ideological stamp on policies unilaterally and has a limited box of tools from which to draw. President Bush needed to persuade other policy actors to cooperate, and the tools at his disposal included rhetorical exhortation, legislative bargaining, and regulatory manipulation.<sup>87</sup> He faced a stiff challenge.

### A. Appointments

Modern presidents have used appointments to executive agencies as one tool to pursue their agenda in a complex environment of competing power centers. Administrative appointees may exercise discretion to change agency rules, budgets, statutory interpretations, and enforcement priorities, or to advance presidential goals that face congressional resistance.<sup>88</sup> Administrative appointments offer clues about the president's policy priorities and general ideological tone. These clues can be ambiguous, however, since appointments also reflect political calculations about the need to placate rival party factions. The President may also seek to promote ethnic, regional, or ideological diversity, and to present appointees willing to face an intense vetting process before a Senate confirmation panel.<sup>89</sup>

While many agencies oversee grazing on public lands, the Bureau of Land Management ("BLM") oversees most of the public land used for grazing. The Forest Service ("USFS") also has significant responsibilities.<sup>90</sup> Although many of the political appointees in these agencies can impact policy formulation and implementation, the highest profile appointees provide a substantive indication of the President's ideological direction.<sup>91</sup> On December 29, 2000, President Bush nominated Gale Norton to be Secretary of the Interior. She was confirmed by the Senate on January 30, 2001, after

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Holochek criticize public land grazing policies for being an overly-subsidized and government-managed industry.

87. Samuel Kernell, *Going Public: New Strategies of Presidential Leadership*, pg. 2 (4th ed., CQ Press 2006); Richard Neustadt, *Presidential Power and the Modern Presidents: The Politics of Leadership from Roosevelt to Reagan*, pp. 21-40 (Free Press 1991); David E. Lewis, *Presidents and the Bureaucracy: Management Imperatives in a Separation of Powers System*, in *The Presidency and the Political System*, pp. 410-429 (Michael Nelson 8th ed., CQ Press 2006).

88. Richard Nathan, *The Administrative Presidency* (John Wiley & Sons 1983); Terry Moe, *The Politicized Presidency*, in *The New Direction in American Politics* (John E. Chubb & Paul E. Peterson, eds., Brookings Instn. Press 1985); Robert F. Durant & Adam L. Warber, *Networking in the Shadow of Hierarchy: Public Policy, the Administrative Presidency, and the Neoadministrative State*, 31 Pres. Stud. Q. 221 (2001).

89. Thomas E. Cronin & Michael A. Genovese, *The Paradoxes of the American Presidency*, pp. 252-256 (2nd ed., Oxford U. Press 2004) (for example, Bush appointed a moderate from a Democratic state, Christine Todd Whitman as EPA Administrator).

90. Ten federal agencies manage grazing on over 260 million acres of public lands. The BLM and the USFS manage grazing on 98 percent of those lands. GAO Report, *Livestock Grazing*, *supra* n77, pg. 5.

91. See Mother Jones, *The Ungreening of America: Behind the Curtain*, [http://www.mother-jones.com/news/feature/2003/09/ma\\_534\\_01.html](http://www.mother-jones.com/news/feature/2003/09/ma_534_01.html) (September-October 2003) (Space does not permit examination of several important appointees, including Bush's first Secretary of Agriculture, agribusiness lawyer Ann Veneman, and her assistant Mark Rey, a former logging industry official as Undersecretary for Natural Resources and Environment).

a contentious debate.<sup>92</sup> At the time of her appointment, Norton was senior counsel at Brownstein, Hyatt, and Farber, a Colorado-based law firm that represents and lobbies for a wide-range of corporate clients. She was also a trustee of the market-oriented think tank the Independence Institute, and a registered lobbyist for NL Industries, a global manufacturing, chemical and mining company. After she graduated from law school in 1978, Norton joined the Mountain States Legal Foundation, a public interest law firm founded by James Watt that describes itself as “one of the Nation’s leading legal centers fighting environmental overkill.”<sup>93</sup> In the 1980s, Norton was a delegate to the Libertarian Party national convention, a scholar at the conservative Hoover Institution, and a fellow at the Political Economy Research Center (“PERC”), a research institute dedicated to free market environmentalism. She also served under President Reagan as as an official at the Department of Agriculture and as Associate Solicitor at the DOI. In 1990 Norton was elected Attorney General of Colorado, a post she held through 1999.<sup>94</sup> During that period, Norton earned a reputation as a critic of government regulation and environmental laws that she regarded as unconstitutional, such as the Surface Mining Reclamation and Control Act, and the Endangered Species Act. She was an outspoken advocate of property rights, “environmental federalism,” and a free market environmentalism that would rely on market incentives rather than government mandates. In 2000, she was part of a libertarian group that advised then-presidential candidate George W. Bush on environmental issues.<sup>95</sup>

Norton’s nomination garnered praise from market-oriented interest groups and condemnation from the major environmental organizations. The Heartland Institute described Norton as an “outstanding choice” that believed in giving local communities and private property owners “the principal role in protecting natural resources.”<sup>96</sup> The Libertarian Party called Norton’s nomination a “giant leap for Libertarian-style environmental policies. . . . She seems to support a sensible free market environ-

92. The Senate vote was 75-24. Lizette Alvarez, *Senate Confirms Nominees For EPA and Interior Posts*, N.Y. Times at <http://query.nytimes.com/gst/fullpage.html?res=940CE7D61F3FF932A05752C0A9679C8B63&sec=&pon=>.

93. Mountain States Legal Foundation, *Featured Environmental Litigation Laws: Communities for a Great Northwest v. U.S. Dept. of the Interior*, [http://www.mountainstateslegal.org/legal\\_cases\\_category\\_home.cfm?casecategoryid=5](http://www.mountainstateslegal.org/legal_cases_category_home.cfm?casecategoryid=5) (March 30, 2008).

94. Norton lost the Colorado Republican Senate primary to current Senator Wayne Allard in 1996. No author, *Senate Nominees Picked in Colorado*, N.Y. Times, August 15, 1996 at [http://notes.sej.org/sej/sejour.nsf/21fd4c7bbaf1be5862568a50017a819/99893ada96f7d89586256d1f00037249/\\$FILE/sej\\_fa99.pdf](http://notes.sej.org/sej/sejour.nsf/21fd4c7bbaf1be5862568a50017a819/99893ada96f7d89586256d1f00037249/$FILE/sej_fa99.pdf).

95. The group included Terry Anderson, co-author of *Free Market Environmentalism*, Lynn Scarlett, President of the libertarian Reason Foundation, and Stephen Hayward, contributing editor of Reason Magazine. Margie Kriz, *Bush on Environment: Leading Republican Candidate Reveals Team and Policies*, SEJournal, Vol. 9, No. 3 (Fall 1999), pg. 19 at [http://www.notes.sej.org/sej/sejour.nsf/21fd4c7bbaf1be5862568a50017a819/99893ada96f7d89586256d1f00037249/\\$FILE/sej\\_fa99.pdf](http://www.notes.sej.org/sej/sejour.nsf/21fd4c7bbaf1be5862568a50017a819/99893ada96f7d89586256d1f00037249/$FILE/sej_fa99.pdf).

96. Joseph Best, *Norton Confirmation is Boon for Common-Sense Environmentalism*, The Heartland Institute, <http://www.heartland.org/Article.cfm?artId=1163> (Mar. 1, 2001).

mentalism that balances the need for a healthy planet with the importance of liberty, property rights, and limited government.”<sup>97</sup> Terry Anderson, of the Property and Environment Research Center, said of Norton, “[i]nside Gale’s head is a flashing sign that says ‘incentives matter,’ that’s the essence of free market environmentalism.”<sup>98</sup>

Environmental interest groups denounced the Norton appointment. A 2001 Sierra Club press release claimed that Norton was “an anti-environmental extremist whose record as a lobbyist for polluters, an attorney for loggers and miners, and a protégé of James Watt makes her unfit to be Secretary of the Interior.”<sup>99</sup> The Natural Resources Defense Council, joining with the Wilderness Society in opposing Norton’s nomination, said, “[h]er positions and beliefs are fundamentally incompatible with the Secretary of Interior’s responsibilities for the stewardship of our precious natural resource heritage.”<sup>100</sup>

During her tenure as the Secretary of the Interior from 2001 to 2006, Norton expressed support for “non-coercive, market-based ways of achieving positive environmental results,” and “economic incentive approaches as an alternative to command-and-control regulation.”<sup>101</sup> In a speech in 2002, she said, “[w]e need a new environmentalism, based on what I call ‘the Four C’s’ — Communication, Consultation, and Cooperation, all in the service of Conservation. At the heart of the Four C’s is the belief that for conservation to be successful, we must involve the people who live on, work on, and love the land and the water.”<sup>102</sup> Throughout her tenure, Norton promoted her vision of a “new environmentalism” through “cooperative conservation,” despite much criticism that she was too cooperative with the extractive industries and other polluters.<sup>103</sup> Norton resigned in March 2006 and took a job as general counsel for Royal Dutch Shell in its “unconventional resources” division, which recovers oil from shale and extra-heavy oils.<sup>104</sup>

On August 21, 2001, President Bush appointed Kathleen B. Clarke as Director of the BLM. She was unanimously confirmed by the Senate on December 20, 2001. At the time of her appointment Clarke was serving as the

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97. The Libertarian Party, *Gale Norton is ‘Giant Leap’ for Environmental Sense*, [http://www.ontheissues.org/Celeb/Libertarian\\_Party\\_Environment.htm](http://www.ontheissues.org/Celeb/Libertarian_Party_Environment.htm) (Jan. 17, 2001).

98. Lynette Warren, *Gale Norton: Enviro-Capitalist*, Union Square J., [http://www.unionsquare-journal.com/warren\\_archive021501.htm](http://www.unionsquare-journal.com/warren_archive021501.htm) (Feb. 15, 2001).

99. Sierra Club, *Gale Norton: The Extreme Anti-Environmental Agenda*, <http://www.common-dreams.org/news2001/0109-13.htm> (Jan. 9, 2001).

100. Natural Resource Defense Council, *Feinstein and Boxer Urged to Oppose Norton Nomination*, <http://www.nrdc.org/media/pressReleases/010118a.asp> (Jan. 18, 2001).

101. Gale Norton, Remarks, *Remarks Prepared for the Sand County Foundation* (Sand County Foundation, Apr. 18, 2002) (available at <http://www.doi.gov/news/020424.html>).

102. *Id.*

103. See *Gale Norton’s Ugly Legacy*, The Lompoc Record, <http://www.lompocrecord.com/articles/2006/03/15/opinions/031506b.txt> (Mar. 15, 2006).

104. Steve McMillan, *Norton Will Join Royal Dutch Shell*, Denver Post, [http://www.denver-post.com/business/ci\\_4910177](http://www.denver-post.com/business/ci_4910177) (Dec. 27, 2006).

Director of the Utah Department of Natural Resources. She previously served on the staff of the Republican United States Senator Wallace Bennett and Republican Congressman James Hansen. Her appointment drew praise from Utah industry associations and criticism from Utah environmental organizations. Lee Peacock, President of the Utah Petroleum Association, said, "[w]e believe her appointment is good for Utah and Western oil and gas."<sup>105</sup> Her critics claimed that as Director of Utah's Department of Natural Resources, Clarke "quickly became a favorite of the state's mining and drilling industry."<sup>106</sup> Mike Reberg of the Southern Utah Wilderness Alliance said, "[s]he's bought onto the Bush-Cheney energy plan and shown that in her actions here, and that's bad for Utah wilderness, [and] bad for American wilderness."<sup>107</sup>

At her Senate confirmation hearings, Clarke expressed a vague and general commitment that BLM would "take a balanced approach in conserving our public lands while sustaining their productivity."<sup>108</sup> Two years later, in a speech to the Society for Range Management, she assured ranchers that the BLM would not change grazing fee formulas nor seek to improve range health by moving cattle off the land. She made it clear that the BLM saw ranchers as partners in the management of the range: "[w]e'll never have enough BLM employees, and I don't think any of you would want us to have as many as it would take to steward the 170 million acres of BLM rangelands. But, working with the ranching community, we'll have all the eyes and ears and hands and hearts we need to be successful in the work we do."<sup>109</sup> Clarke also criticized grazing reforms enacted by the Clinton Administration that had been unpopular among ranchers:

Some of you may remember fondly the days when BLM was called the, or referred to, as the Bureau of Livestock and Mining, and based on what's happened in the last decade, some people think it's much closer to the Bureau of Landscapes and Monuments. But I'm here today to tell you we're still interested in multiple use and my motivation for coming to this agency was to secure this mission.<sup>110</sup>

Clarke noted that the BLM would soon issue notice of intent to change some of those Clinton era rules,<sup>111</sup> and she encouraged ranchers to provide comments.

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105. Kent Larsen, *Mormon Woman to be First to Head BLM*, Mormon News, [www.mormonstoday.com/010831/T2KClarke01.shtml](http://www.mormonstoday.com/010831/T2KClarke01.shtml) (Aug. 31, 2007).

106. *The Ungreening of America: Behind the Curtain*, *supra* n. 91.

107. Larsen, *supra* n. 105.

108. Sen. Energy and Nat. Resources Comm., *Confirmation Hearings*, <http://www.blm.gov/nhp/news/legislative/pages/2001/te011114.htm> (Nov. 14, 2001) (Kathleen B. Clarke, testifying).

109. Kathleen B. Clarke, Speech, (Society for Range Management, Casper, Wyo., Feb. 2, 2003).

110. *Id.*

111. *Infra* nn. 126-145 (discussing regulatory reforms).

Several other Bush-appointees in the DOI reflect these political and policy priorities. J. Steven Griles became Deputy Secretary of the Interior in July 2001. At the time of his appointment, Griles was the President of J. Steven Griles and Associates, a lobbying firm representing coal, oil, gas and electric companies. He was also a principal of National Environmental Strategies, another lobbying firm for the coal, oil, and gas industries.<sup>112</sup> Prior to his lobbying career, Griles served in the DOI under Reagan as Assistant Secretary for Lands and Minerals Management, Deputy Assistant for Land and Water, and Deputy Director of the Office of Surface Mining. Griles' appointment was praised by Norton, who said that Griles brought "enormous institutional knowledge as well as extensive experience in bringing all voices together to turn environmental and energy conflicts into sound solutions."<sup>113</sup> Environmental groups denounced the appointment, calling Griles "the Mike Tyson of the coal and industry operatives."<sup>114</sup> As an industry lobbyist and former Reagan Administration official, Griles earned a reputation as an aggressive supporter of oil, gas, and coal development, and a staunch critic of government regulation of those industries. His tenure in the DOI under President Bush was marked by constant controversy, as he was investigated for ethics violations regarding his continued close contact with former industry clients. He resigned in 2005 and resumed his position as an industry lobbyist. In 2007 he pled guilty to charges of lying to Congress about his relationship with convicted lobbyist Jack Abramoff, and was sentenced to ten months in prison.<sup>115</sup>

President Bush appointed William G. Myers III as Solicitor of the DOI, its chief legal officer and third-ranking official. At the time of his appointment, Myers worked with the law firm of Holland and Hart, where he represented grazing and mining interests. He previously served as Director of Federal Lands for the National Cattlemen's Beef Association, and Executive Director of the Public Lands Council, an organization of ranchers formed by the NCBA, the American Sheep Industry, and the Association of National Grasslands. A staunch critic of numerous environmental laws, he challenged Rangeland Reform 94, the Clinton Administration's grazing reform, on behalf of the ranching industry.<sup>116</sup> He had described Rangeland

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112. Dept. of the Interior, Press Release, *Norton Announces Nomination of J. Steven Griles to Serve as Deputy Secretary of the Interior* (Mar. 8, 2001) (available at <http://www.doi.gov/news/010308a.html>).

113. *Id.*

114. Friends of the Earth, Press Release, *Watchdogging the Interior Department* (Mar. 16, 2001) (available at <http://www.foe.org/camps/eco/interior/opposegrilespr.html>).

115. See U.S. Dept. of Jus., *Attachment A: Factual Basis for the Plea of James Steven Griles*, [http://www.usdoj.gov/criminal/pr/press\\_releases/2007/03/2007\\_5070\\_4\\_03-23-07griles-fact.pdf](http://www.usdoj.gov/criminal/pr/press_releases/2007/03/2007_5070_4_03-23-07griles-fact.pdf) (Mar. 20, 2007).

116. In 1997 testimony before a House Subcommittee, Meyers said regarding *PLC v. Babbitt*, 529 U.S. 728 (2000): "I was the person who helped coordinate the five plaintiffs in the bringing of that suit and helped hire the attorneys." H.R. Subcomm. on Livestock, Dairy, and Poultry of the H.R. Comm. on

Reform 94 as "little more than a massive new regulatory regime designed to restrict livestock operators on some 220 million acres of federal land. . . . [It] epitomizes the flawed belief that centralized government can promote environmentalism by dictating national standards."<sup>117</sup> As Solicitor, Myers continued to criticize environmental regulations that he believed burdened ranchers and allowed government to micromanage land use decisions. In a speech to the NCBA he said, "[t]he biggest disaster now facing ranchers is not nature . . . but a flood of regulations designed to turn the West into little more than a theme park."<sup>118</sup> In a speech to the Nevada Cattlemen's Association, Myers complained, "[i]t has gotten to the point where you can hardly dig a post hole without having to do an environmental analysis."<sup>119</sup>

Myers' sympathy for the ranching industry earned him praise from its lobbyists. John Falen, past president of the Nevada Cattlemen's Association, said, "Bill's our friend. It's been a long time since we had a friend in the solicitor's office."<sup>120</sup> In 2002, Myers wrote a controversial memorandum reversing statutory interpretations of the Clinton Administration and making it more difficult for conservation groups to purchase grazing permits from ranchers in order to retire them.<sup>121</sup> In 2003, Myers resigned when President Bush nominated him to the United States Court of Appeals for the Ninth Circuit (Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington), although his nomination was ultimately blocked by Senate Democrats. In 2005, the Inspector General issued a letter criticizing Myers for circumventing normal procedures, ignoring Justice Department concerns, and engaging in "an inappropriate level of programmatic involvement" in BLM settlement talks with a well-connected Wyoming rancher accused of violating federal grazing laws.<sup>122</sup>

Lynn Scarlett was confirmed in July 2001 as the Assistant Secretary of the Interior for Policy, Management, and Budget. In 2005 she was named Deputy Secretary of the Interior (and served as Acting Secretary for a brief period in 2006 after Norton's resignation). At the time of her appointment, Scarlett was the President of the Reason Foundation, a libertarian research institute and publisher of the libertarian magazine *Reason*. She published

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Agric., Forage Improvement Act of 1997, [http://commdocs.house.gov/committees/ag/hagforage.000/hagforage\\_of.htm](http://commdocs.house.gov/committees/ag/hagforage.000/hagforage_of.htm) (Sept. 17, 1997).

117. William G. Myers III, *Western Ranchers Fed Up with the Feds*, 11 Forum for Applied Research and Pub. Policy 22, 25 (1996).

118. *The Ungreening of America*, *supra* n. 91.

119. Scott Sonner, *Fed Official Assuages Ranchers*, Las Vegas Rev. J., [http://www.reviewjournal.com/lvrj\\_home/2002/Nov-16-Sat-2002/news/20079539.html](http://www.reviewjournal.com/lvrj_home/2002/Nov-16-Sat-2002/news/20079539.html) (Nov. 16, 2002).

120. *Id.*

121. Office of the Solicitor, Dept. of Interior, *Memorandum M-37008*, <http://www.rangebiome.org/headlines/nr/myersmemo.pdf> (Oct. 4, 2002). A Solicitor's memorandum expresses the Department's legal position and is binding on the Department's offices and officials.

122. Earl E. Devaney, Inspector General, Dept. of Interior, "Letter to Jeffery Ruch, Executive Director, Public Employees for Environmental Responsibility," [http://www.peer.org/docs/doi/2005\\_16\\_2\\_doi\\_igletter.pdf](http://www.peer.org/docs/doi/2005_16_2_doi_igletter.pdf) (Feb. 10, 2005).

numerous articles on free market environmentalism or, what she called “new environmentalism,” and was an environmental advisor to George W. Bush during his candidacy. Scarlett was a long-time critic of “traditional environmentalism,” which she claimed was “shaped by people who demanded that environmental values trump all other considerations and who assumed that regulatory elite possessed all necessary knowledge.”<sup>123</sup> According to Scarlett, traditional environmentalism “fail[ed] to appreciate the power of incentives to change behavior.” The “new environmentalism,” in contrast, “views economic incentives as critical determinants of behavior. For this reason, the new vision views markets and the property rights on which they depend as tools for environmental problem solving.”<sup>124</sup> In a 2004 interview she said, “to a certain extent, Adam Smith’s ‘invisible hand’ has a green thumb.”<sup>125</sup> Scarlett argued that the Administration’s policy was to move “beyond the punitive, prescriptive regulations of the last thirty years—to include programs that engage local communities in environmental stewardship and stimulate markets in the direction of environmental innovation.”<sup>126</sup>

President Bush’s top level appointments to the positions most closely connected to public lands management were a mix of those seeking to maintain traditional access to public lands resources, and those pursuing a free-market regulatory agenda. Norton and Scarlett brought to their positions a clear ideological inclination towards a free market policy agenda consistent with Bush’s cowboy capitalism. Both had a record of publications, speeches, and organizational affiliations that reflected pro-market policies. Clarke, Myers, and Griles pursued the agenda of regulated industries, which also aimed to reduce command and control regulation, but supported government subsidies. Myers was especially associated with ranching interests that sought to protect most aspects of the status quo, while rolling back more recent and restrictive environmental regulations.

### B. Regulatory Changes

Among the Bush Administration’s most significant efforts regarding grazing on public lands were proposed changes to grazing regulations issued on July 12, 2006 following several years of public hearings and revisions. When announcing the proposed changes, Secretary Norton said, “[t]he proposed rule will help public lands ranchers stay on the land,” and it

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123. Lynn Scarlett, *Evolutionary Ecology*, Reason, <http://www.reason.com/news/printer/29925.html> (May 2006).

124. Lynn Scarlett, *New Environmentalism* 3-4, <http://www.ncpa.org/pub/st/st201/st201.pdf> (Jan. 1997).

125. Amanda Griscom, *Interior Design: An Interview with Interior’s Lynn Scarlett, One of the Architects of Bush’s New Environmentalism*, Grist, <http://www.grist.org/cgi-bin/printthis.pl?uri=/news/maindish/2004/01/12/design/index.html> (Jan. 12, 2004).

126. *Id.*

"recognizes that ranching is crucial not only to the economies of Western rural communities, but also to the history, social fabric, and cultural identity of these communities."<sup>127</sup> Director Clarke said, "[t]his proposed rule reflects our Agency's commitment to continue livestock grazing as one of the legitimate uses of the public lands. . . . [The rule] is a major step forward for effective, efficient public rangeland management."<sup>128</sup> The "Background" section asserts, "[t]he final rule recognizes the many benefits of livestock grazing on public lands, including its social and economic contributions to rural communities and its preservation of open space in the rapidly growing West, as well as the importance of maintaining healthy rangelands and wildlife habitat."<sup>129</sup> A "Questions and Answers" sheet from the BLM that accompanied the rule explained that the new grazing regulations were intended to "improve the agency's working relationship with public lands ranchers (permittees and lessees), conserve rangeland resources, and enhance administrative efficiency."<sup>130</sup>

To improve working relations with ranchers, the rule provided that permittees would share title to future range improvements, such as fences, wells, or pipelines, thereby repealing a provision of Rangeland Reform 94, which gave sole title to the United States. The rule requires that a grazing use decrease (or increase) of more than ten percent be phased in more slowly (over five years), unless the operator agrees to a shorter period.<sup>131</sup> It requires the BLM to use "consistent" methodology when documenting the social, cultural, and economic impacts of grazing decisions. The rule also requires the BLM to cooperate with local ranchers and boards in reviewing grazing allotment plans.<sup>132</sup>

To conserve rangeland resources, the rule allows livestock operators to rest the land as needed by applying for a non-use grazing permit each year. Current regulations limit non-use to three consecutive years, after which time a permit holder must graze the allotment. The new regulation, as the first sentence states, allowed non-use to be authorized each year. The regulation prohibited BLM from assuming that grazing practices were the main cause of a failure to meet rangeland health standards. However, it required the agency to use "monitoring data" to document and to better understand

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127. Department of the Interior, Press Release, *Interior Secretary Announces Proposed Grazing Rule That Would Improve Grazing Management, Help Continue Public Lands Ranching* (Dec. 5, 2003) (available at [www.blm.gov/nhp/news/releases/pages/2003/pr031205\\_grazing.htm](http://www.blm.gov/nhp/news/releases/pages/2003/pr031205_grazing.htm)).

128. *Id.*

129. "Factsheet on the BLM's New Grazing Regulations," Bureau of Land Management, US Department of the Interior, July 12, 2006 at 1. ([http://www.blm.gov/nhp/news/releases/pages/2006/pr060712\\_July2006\\_GrazingFactSheet.pdf](http://www.blm.gov/nhp/news/releases/pages/2006/pr060712_July2006_GrazingFactSheet.pdf)).

130. Bureau of Land Mgt., *Questions and Answers re: the BLM's New Grazing Regulations*, [http://www.blm.gov/nhp/news/releases/pages/2006/pr060712\\_July2006\\_GrazRuleQs&As.pdf](http://www.blm.gov/nhp/news/releases/pages/2006/pr060712_July2006_GrazRuleQs&As.pdf) (July 12, 2006).

131. An increase or decrease in "grazing use" may mean a change in the permitted number of animals, or the number of days they may be grazed. 71 Fed. Reg. 39,404 (2006).

132. *Id.* at 39,404, 39,405.



the role of various grazing practices in the allotment's failure.<sup>133</sup> In cases where grazing practices are at issue, the new rule allows up to twenty four months, whereas the old rule required an action plan "prior to the next grazing season." The BLM asserts that twenty four months is a more realistic timeframe for developing scientifically sound remedies.<sup>134</sup>

The new rule eliminated long-term "conservation use" permits in order to comply with federal court rulings.<sup>135</sup> It also restores the pre-1995 definition of "grazing preference" to include an amount of forage on public lands linked to a rancher's "base" property, as opposed to the current regulations, which define "grazing preference" as precedence in the "line."<sup>136</sup>

To enhance administrative efficiency, the new rule modified the definition of "interested public," reducing the range of groups that the agency must consult prior to making specific grazing decisions.<sup>137</sup> It also reversed provisions of Rangeland Reform 94 by limiting the ability of the BLM to cancel permits or otherwise act against permittees that have been convicted of violations that did not occur on their allotment. The rule also limited the range of BLM decisions that trigger protest and appeal under the Endangered Species Act.<sup>138</sup>

The BLM issued an Environmental Impact Statement (EIS) to document the ecological, cultural, social, and economic effects that would result from the proposed regulation changes. The EIS predicted "short-term adverse effects" on the environment from the five-year phase-in for changes in use over ten percent, the monitoring required before attributing poor rangeland health to livestock grazing, and the time extension allowed for implement-

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133. *Id.* at 39,421. The rule does not address stocking levels which are "better addressed during the land use and activity planning process." See also 43 C.F.R. pt. 4100.

134. The prior rule allowed the BLM to order a reduction in the number of animals and a change in the season of use, but not until the next grazing season. The new rule allowed the BLM to change grazing practices within 24 months. President Bush and other advocates of the new rule argued that if given more time, scientifically sound remedies other than grazing reductions could be developed to improve rangeland health.

135. *Pub. Lands Council v. Babbitt*, 167 F.3d at 1292.

136. The owner of a "base property" that acquires a grazing permit holds a "preference" for forage on the public lands. The old regulations defined "preference" as a priority position for renewing a permit or securing additional forage. The new regulations define the "preference" a permit holder has in terms of an actual quantity of forage, restoring the pre-1995 definition, and providing more assurance that a certain number of animals may be maintained on the allotment. Compare 43 C.F.R. 4100.0-5 (1995) with 43 C.F.R. 4100.0-5 (2006).

137. According to the BLM, "in-depth involvement of the public in day-to-day management decisions is neither warranted nor administratively efficient...Cooperation with permittees and lessees, on the other hand, usually results in more expeditious steps to address resource conditions and can help avoid lengthy administrative appeals." 43 C.F.R. pt. 4100.

138. This is a general summary of the many rule changes made in the "Final Rule." See also BLM, *Factsheet on the BLM's New Grazing Regulations*, [http://www.blm.gov/nhp/news/releases/pages/2006/pr060712\\_July2006\\_GrazingFactSheet.pdf](http://www.blm.gov/nhp/news/releases/pages/2006/pr060712_July2006_GrazingFactSheet.pdf) (July 12, 2006); See also BLM, *Questions and Answers re: the BLM's New Grazing Regulations*, [http://www.blm.gov/nhp/news/releases/pages/2006/pr060712\\_July2006\\_GrazRuleQs&As.pdf](http://www.blm.gov/nhp/news/releases/pages/2006/pr060712_July2006_GrazRuleQs&As.pdf) (July 12, 2006). The Congressional Research Service has also produced a concise summary of the process and substance of the regulation changes. Carol Hardy Vincent, *Grazing Regulations: Changes by the BLM*, Congressional Research Service Report for Congress, Order Code RL32244, (Mar. 15, 2007).

ing remedial action. In the long-term, the BLM anticipates that the use of monitoring data and the longer timeframe for implementing grazing changes will be “beneficial to rangeland health,” since the BLM can no longer mandate quick reductions without sound data.<sup>139</sup>

The BLM rejected comments by the Fish and Wildlife Service, which claimed that the proposed rule threatened fish and wildlife, made grazing a priority over other uses, was inadequate to protect “sensitive species and their habitat,” and could compromise the ability of the BLM to “manage the public’s resources to the degree necessary to insure their health.”<sup>140</sup> The BLM also rejected the conclusions of two of its staff scientists, who had participated in drafting the EIS and concluded that the new rule would adversely affect water quality, wildlife, and riparian habitats.<sup>141</sup>

After the BLM issued the new regulations, a number of environmental groups filed lawsuits alleging that the proposed rule violated existing public participation statutes, and failed to comply with the National Environmental Policy Act (NEPA), which requires an EIS to be “comprehensive.” In 2007, the U.S. District Court for the District of Idaho pointed out that BLM’s new regulations “limit public input from the non-ranching public, offer ranchers more rights on the BLM land, restrict the BLM’s monitoring of grazing damage, extend the deadlines for corrective action, and dilute the BLM’s authority to sanction ranchers for grazing violations. While the BLM justifies the changes as making it more efficient, the BLM was not their originator—it was the grazing industry and its supporters that first proposed them.”<sup>142</sup> The court ruled that the regulatory attempt to limit public input into BLM grazing decisions and to delay implementation of corrective actions violated NEPA and FLPMA.<sup>143</sup> Moreover, the BLM’s failure to adequately consult with the Fish and Wildlife Service (FWS) about the impacts of the proposed rule on sensitive species and habitat violated the Endangered Species Act.<sup>144</sup> The court enjoined the new regulations.<sup>145</sup>

The Bush Administration sought to ease the regulatory burden and spur investment in public rangeland improvements through regulatory changes supported by the livestock industry. These changes met fierce resistance

139. Department of the Interior, *Proposed Revisions to Grazing Regulations for the Public Lands: Final Environmental Impact Statement* ES-5 (Oct. 2004).

140. BLM, *Bureau of Land Management Proposed Rule for Grazing Administration--Exclusive of Alaska and the Proposed Revisions to Grazing Regulations for the Public Lands Draft Environmental Impact Statement* 2-7, [http://www.fguardians.org/support\\_docs/BLM\\_FWS-draft-EIS-comments.doc](http://www.fguardians.org/support_docs/BLM_FWS-draft-EIS-comments.doc) (undated).

141. 71 Fed. Reg. 39,422-39, 423 (2006); *See also* Tony Davis, *New Grazing Rules Ride on Documented Science*, 37 High Country News (July 25, 2005).

142. *W. Watersheds Project v. Kraayenbrink et al.*, 2007 WL 1667618, 2 (Idaho Dist. 2007).

143. *Id.* at 2-3.

144. *Id.* at 2.

145. Ranchers’ lobbyists, like the Public Lands Council, urged the Administration to appeal the ruling, yet the Administration has not publically stated how it will proceed. *See* PLC, *Letter to Secretary of the Interior*, <http://www.thepubliclandscouncil.org/plc2/default.asp?PID=4087> (Aug. 10, 2007).

from career scientists in the BLM and the FWS. Environmental interest groups and other opponents successfully used the courts to block the Administration.

### C. Permit Retirement

The retirement of grazing permits by environmental groups is another high profile public lands grazing issue that the Bush Administration has addressed. These buyouts increase the role of market forces in allocating resources among competing users of public lands, and decrease the role of politics.<sup>146</sup> The most prominent efforts have involved the Grand Canyon Trust (Trust), which purchased grazing permits in the Grand Staircase-Escalante National Monument (GSENM) above the North Rim of the Grand Canyon. In the late 1990s, the Trust began buying grazing permits from willing ranchers and removing cattle from hundreds of thousands of acres with little notice.<sup>147</sup> In 2001, the Trust spent over a million dollars on several permits covering several hundred thousand acres in GSENM after negotiating a retirement process with BLM officials.<sup>148</sup> The Trust offered to relinquish the permits to the BLM. In response, the BLM prepared an Environmental Assessment (EA) for each allotment to consider land use plan amendments to retire grazing permits.<sup>149</sup> The Trust's Bill Hedden sought

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146. David G. Alderson, *Buyouts and Conservation Permits: A Market Approach to Address the Federal Public Land Grazing Problem*, 12 N.Y.U. Envtl. L.J. 903 (2005). The various proposals to have the federal government "buyout" ranchers willing to sell their grazing permits in order to permanently retire livestock grazing, which the Administration opposes, will not be examined in this paper. See H.R. 3166, 109<sup>th</sup> Cong. (2005); See also National Public Lands Grazing Campaign, *Home Page*, <http://www.publiclandsranching.org> (March 25, 2008).

147. The process typically had the Trust purchase a permit from a rancher willing to sell and then relinquish the permit to the BLM or USFS, which would then amend the land use plan to cancel grazing as a use. See Alderson, *supra* n. 146; See also Steven C. Forrest, *Creating New Opportunities for Ecosystem Restoration on Public Lands*, 23 Pub. Land & Resources L. Rev. 21 (2002); See also Toni Thayer, *Why You Can't Trust the Trust*, Range Magazine, [www.rangemagazine.com/archives/stories/winter03/dont-trust.htm](http://www.rangemagazine.com/archives/stories/winter03/dont-trust.htm) (Winter 2000) (criticism of GCT, its Board of Directors, and major funders); See also Toni Thayer, *Cash Cows Don't Graze: The Peculiar Relationship of Grand Canyon Trust and Wal-Mart*, Range Magazine, [www.propertyrightsresearch.org/2006/articles08/cash\\_cows\\_don.htm](http://www.propertyrightsresearch.org/2006/articles08/cash_cows_don.htm) (Fall 2005).

148. Canyonlands Grazing Corporation Post-Hearing Brief in *Lefevre et al v. BLM*, U.S. Department of Interior Office of Hearings and Appeals, November 15, 2005 at 4. The GSENM staff, the BLM, and GCT had apparently collaborated in this process in 1998 during the Clinton Administration. See The Kane and Garfield County Commissions, *UT: Kane and Garfield County Commissioners Challenge BLM, Grand Canyon Trust*, Sierra Times (Feb. 20, 2003), [http://citizenreviewonline.org/feb\\_2003/utah.htm](http://citizenreviewonline.org/feb_2003/utah.htm).

149. See 43 U.S.C. § 1712(a). The BLM manages allotments according to "land use plans" that generally provide for certain levels of grazing. Land use plans can be amended through a formal process that includes an EA to analyze the environmental consequences of proposed changes in land uses. The process also requires public consultation and allows formal protests. The offer to relinquish a grazing permit may "trigger" an EA and an amendment to the land use plan. The process that was worked out between the Trust and BLM was to have the Trust buy a grazing permit from a willing seller at a mutually agreeable price, and then offer to "relinquish" the permit to the BLM. The BLM would conduct an EA and then amend the land use plan to "retire" the grazing use and allocate the forage on the allotment to "wildlife" or "conservation" uses. Canyonlands Grazing Corporation Post-Hearing Brief in *LeFevre et al v. BLM*, U.S. Department of Interior Office of Hearings and Appeals, November 15, 2005 at 4. The

assurance from congressman Chris Cannon that the retirement process was appropriate. Cannon secured letters from Norton and Scarlett, who expressed their support for this “market-based solution” in which the market would determine the use of the land.<sup>150</sup> Norton wrote, “I would strongly endorse this action.”<sup>151</sup>

The BLM issued final EAs in 2002, recommending that the allotments be closed to grazing, and that forage be reallocated to protect wildlife and riparian corridors. Two counties in Utah containing large allotments filed protests alleging that the recommendations violated the TGA. After rejection of the protest by the BLM, the counties and several ranchers appealed the decision to the DOI, arguing that the Trust was not qualified to hold the permits because it was not in the livestock business and did not intend to graze. In testimony during subsequent hearings, the former Public Lands Chairman of the Utah Cattlemen’s Association claimed that the suit was encouraged by Clarke, who opposed the effort to cancel grazing despite the support from Norton and Scarlett.<sup>152</sup> One Kane County Commissioner said:

I think [the retirement agreement] seriously threaten[s] the stability of the livestock industry in southern Utah, and cumulatively, I think it threatens the livestock industry in the West, which relies on public lands grazing. . . . If this process of buyout, relinquishment and permanent closure of the allotment to grazing — if that process can take hold, it will sweep like wildfire through the grazing communities.<sup>153</sup>

Several ranchers applied for retired permits. The Trust refused to relinquish the permits until the DOI responded to the protests and the applications. In the meantime, Myers issued an opinion that existing statutes allowed only Congress to permanently exclude lands from grazing, and that allotments found to be chiefly valuable for grazing remained subject to applications for

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“retirement” would not be permanent because the BLM could complete another EA and land use plan amendment at a later date.

150. See Julie Brugger, *Contesting Neoliberal Governmentality in the New West: The Taylor Grazing Act Reconsidered*, paper presented at Liberalism, Governance, and the Geographies of Law, University of Washington Simpson Center for the Humanities, May 11-12, 2007 (detailed chronology of the GSENM controversy).

151. See *UT: Kane and Garfield County Commissioners Challenge BLM, Grand Canyon Trust*, *supra* n.148.

152. *Id.* The Public Employees for Environmental Responsibility asked the DOI Inspector General to investigate whether Clarke’s actions violated the law or conflict of interest regulations. Ltr. from Jeff Ruch to Earl E. Devaney (Aug. 29, 2005) (available at [http://www.peer.org/docs/blm/05\\_29\\_8\\_oig\\_request.pdf](http://www.peer.org/docs/blm/05_29_8_oig_request.pdf)).

153. Joe Bauman, *Grazing Permit a Threat?*, *Deseret Morning News*, <http://deseretnews.com/dn/print/1,1442,635180424,00.html> (Jan. 1, 2006).

grazing permits.<sup>154</sup> This opinion reversed the previous opinion issued under the Clinton Administration.<sup>155</sup>

By 2003, after two years of reduced or suspended grazing in GSENM due to drought, the BLM reauthorized grazing. The Trust purchased and leased cattle to graze its allotments at minimal levels, and eventually purchased two ranches. In early 2003, an administrative law judge rejected the Utah counties' and ranchers' appeal regarding the Trust's permits.<sup>156</sup> The ranchers and counties appealed the decision at several levels, and lost in each instance. A federal court ultimately found that the counties acted unlawfully by paying the ranchers' legal costs.<sup>157</sup> The BLM announced that it would defer further action until it could complete an EIS addressing the entire GSENM.<sup>158</sup> This EIS has not yet been completed.

In this case, the Bush Administration prevailed in allowing environmental groups to purchase grazing permits from willing sellers in order to reduce or eliminate grazing despite opposition from a Director of the BLM that Bush appointed. The Administration successfully defended its position against ranchers, their associations, and local officials. President Bush agreed with Clarke and most ranchers.

Uncertainty remains about the retirement process due to the incomplete EIS, which could lead to a reduction or elimination of grazing. On the other hand, it may support continued grazing, especially given the political pressure on the BLM. Uncertainty also exists because the administrative process cannot permanently end grazing on public lands. Rather, Congress must act to cancel a grazing permit. The BLM reiterated this position in an Instructional Memorandum issued in 2007: "receiving a grazing relinquishment of preference does not, in and of itself, result in the forage becoming unavailable for use by livestock. Reassigning the available forage allocation for livestock grazing due to relinquishment supports the BLM's multiple-use mission."<sup>159</sup> The Memorandum also made clear that the BLM was not bound by "any agreement or contract that involves third-party compensation to a permittee or lessee for submitting a relinquishment to

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154. Department of the Interior, Office of the Solicitor, *Authority for the Bureau of Land Management to Consider Requests for Retiring Grazing Permits and Leases on Public Lands* M-37008 (Oct. 4, 2002). Myers had previously served as Executive Director for the National Cattlemen's Beef Association and the Public Lands Council. Critics argue that Myers interpretation is a misreading of the laws. See e.g. Alderson, *supra* n. 146, at 928.

155. Office of the Solicitor to BLM re: Authority for BLM to Act on Requests for Voluntary Retirement of Livestock Grazing Permits on BLM-Managed Public Lands, pp. 1-4 (Jan. 19, 2001) (Subject line of official memorandum written by John Leshy, Solicitor, Dept. of the Interior, to Director, BLM).

156. *LeFevre, et al v. BLM*, U.S. Department of Interior Office of Hearing and Appeals, Order, p. 37 (Jan. 26, 2006).

157. *Grand Canyon Trust v. Kane Co.*, Case 060600098 (Sixth District Court Utah Dist. 2007).

158. BLM, Record of Decision and Finding of No Significant Impact For an Amendment to the Paria and Escalante Management Framework Plans, p. 1 (Jan. 9, 2003).

159. BLM, *Relinquishment of Grazing Preference on BLM Administered Lands*, <http://www.blm.gov/nhp/efoia/wo/fy07/im2007-067.htm> (Feb. 20, 2007).

BLM.”<sup>160</sup> This makes purchasers reluctant to relinquish a permit to BLM since it could be reallocated for grazing. Holding the permit, however, requires that they graze the allotment.<sup>161</sup>

Recent official pronouncements by Administration officials reaffirm their support for maintaining grazing on public lands. In a 2007 speech to the Public Lands Council, USFS Chief Gail Kimbell said:

[r]anching is not only part of the West, the culture of ranching is also part of the Forest Service. . . . I see four major threats to the health and productivity of the lands we jointly manage: fire and fuels, invasive species, loss of open space, and unmanaged outdoor recreation. These are the true concerns we should be focusing on in managing public lands . . . not livestock grazing.<sup>162</sup>

Former Deputy Director of the BLM Jim Hughes testified before Congress that the Bush Administration recognized that sustainable use of rangelands was “vital to the economic well-being and cultural identity of the West and to rural Western communities.” He said, “[w]e are working diligently to . . . assure stability of ranching on public lands.”<sup>163</sup> Currently, the USFS openly supports livestock grazing on National Forest System lands, stating, “that livestock grazing on these lands, if responsibly done, provides a valuable resource to the livestock owners as well as the American people.”<sup>164</sup>

#### D. Sustaining Working Landscapes

The Bush Administration considered more significant grazing policy changes that would have provided even more flexibility for managers than allowed by the current statutory and regulatory regime. The BLM’s “Sustaining Working Landscapes Initiative” sought new mechanisms to restore and maintain rangeland health, including conservation partnerships, reserve common allotments, and voluntary allotment restructuring, while simultaneously maintaining the economic viability of ranching operations.<sup>165</sup>

160. *Id.*

161. Opponents who fought the GCT relinquishment plan have taken some consolation in this. Rancher and Utah State Representative Mike Noel said, “We turned them from environmentalists into cowboys. I guess what they can do is get their cows and start losing money like the rest of us.” Bauman, *supra* n. 153.

162. Gail Kimbell, Speech, *Partnerships for Working Ranches: Key to Rangeland Health* (Public Lands Council Spring Conference, Mar. 26, 2007) (transcr. available at <http://www.fs.fed.us/news/2007/speeches/03/rangeland.shtml>).

163. Sen. Subcomm. Pub. Lands and Forests of Sen. Energy and Nat. Resources Comm., *Public Rangeland Management and Livestock Grazing on Public Lands*, <http://www.blm.gov/nhp/news/legislative/pages/2005/te050928.htm> (Sept. 28, 2005).

164. USFS, *Why Does the Forest Service Permit Livestock Grazing on NFS Lands?*, <http://www.fs.fed.us/rangelands/uses/allowgrazing.shtml> (last accessed Mar. 12, 2007).

165. BLM, *Home Page*, [http://www.blm.gov/co/su/en/BLM\\_Information/newsroom/2003/blm\\_grazing\\_policy.print.html](http://www.blm.gov/co/su/en/BLM_Information/newsroom/2003/blm_grazing_policy.print.html) (initiative described).

Some of these mechanisms would have provided a bigger role for ranchers in management decisions in accordance with Secretary Norton's preference for conservation through consultation, communication, and cooperation.

Among the more extensive policy changes discussed under the Sustaining Working Landscapes Initiative were "Conservation Partnerships," which would have allowed permittees to voluntarily and temporarily devote an allotment to providing environmental services, such as riparian restoration, enhanced water flow and quality, improved wildlife and fisheries habitat, or endangered species recovery. The creation of "Reserve Common Allotments" would have provided alternative grazing areas for permittees while they devoted their customary allotment to rangeland recovery. "Voluntary Allotment Restructuring" would have allowed livestock operators to develop partnerships with other operators, the BLM, or even non-grazing groups in order to merge allotments and provide more forage while restoring rangeland health. Conservation Easements would have allowed ranchers to voluntarily accept restrictions on the use of their property and gain grazing access to other BLM lands, thereby allowing more flexibility for meeting conservation goals like preserving open space.<sup>166</sup>

The policy changes considered would have allowed more fluid and flexible management of grazing lands and allowed permittees to voluntarily devote their allotments to non-grazing conservation use, with fewer top-down mandates on grazing.<sup>167</sup> However, these changes would not seriously challenge this framework, as it sought to increase conservation without disrupting grazing on public lands. Nonetheless, after years of deliberation, the Administration decided not to pursue these changes.<sup>168</sup>

## V. THE TRAILS NOT TAKEN

As a candidate George W. Bush advocated for a version of "cowboy capitalism" that mistrusted government, rejected federal command-and-control statutes, and argued that "government must replace antiquated laws that restrict opportunity, increase costs, and inhibit innovation."<sup>169</sup> As President, however, Bush has not pursued grazing reform that reflects these beliefs. In fact, the market-oriented PERC gave his Administration a C+ for its grazing policies, claiming, "in spite of promising rhetoric, the Bush

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166. *Id.*

167. There have, in fact, been examples across the West of innovative and cooperative efforts to integrate grazing and conservation on public and private lands. See Jake Page, *Ranchers Form a 'Radical Center' to Protect Wide-Open Spaces*, *Smithsonian* 50-60 (June 1997) (discussion of the Malpai Borderlands Group).

168. The broader concept of "cooperative conservation" which would involve voluntary collaboration between federal agencies, local governments, private property owners, and non-profit and for-profit entities was reflected in the June 2007 legislative proposal by the DOI called the Cooperative Conservation Enhancement Act. It does not explicitly address the grazing reforms discussed above. Copy of the Cooperative Conservation Enhancement Act available at <http://www.doi.gov/initiatives/CooperativeConservationEnhancement%20Act.pdf>.

169. Bush, *supra* n. 16.

Administration has failed to open up grazing to a market approach.”<sup>170</sup> Various scholars, think tanks, and politicians have proposed other market-oriented grazing reforms, ignored by the Bush Administration, which deserve a brief overview.

Free-market advocates have long argued that most bureaucratic management of grazing, combined with the insecurity of grazing rights, leads to a misallocation of forage resources. In 1962, Gardner wrote that agency allocations and other “non-price rationing criteria” prevent resources from serving highest potential economic use, and impede economic development by “diminishing the product that might have been taken from the resource.”<sup>171</sup> Nelson argues that “the lack of any clear rights on federal rangelands has resulted in blurred lines of responsibility[,] which have been as harmful to the environment as they have been to the conduct of the livestock business.”<sup>172</sup> Since no market option exists for registering the demand for alternative land uses, it is funneled into the political system, where the relative strength of special interest groups influence land use decisions. As a result, resources do not necessarily flow to the highest valued use. Meanwhile, the possibility that political pressure may cause a grazing permit to be reallocated to another use depresses the value of the permit and the property.<sup>173</sup> Ranchers, having no long-term security in their own grazing rights, are thereby given an incentive to make short-term decisions as resource users and land managers.

A more common market-oriented policy reform proposal is to create forage rights that can be bought and sold in the market. Hess and Wald argue:

Congress should bust the cowboy trust on federal lands. All Americans should be free to acquire permits to federal grass and to use the lands to enhance wildlife, stabilize soils, protect endangered species, improve riparian areas or, if they prefer, raise red meat.<sup>174</sup>

Forage rights could be re-defined in a variety of ways. The PERC proposes that the government sell the rights to the current permit holder at a price that incorporates the future value of the grazing fee.<sup>175</sup> Once forage

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170. Bruce Randle & Jane S. Shaw, eds., *PERC Report Card Environmental and Natural Resource Policies Bush Administration 2003-2004: Executive Summary* iii, [http://www.perc.org/pdf/reportcard\\_2004/00exsummary.pdf](http://www.perc.org/pdf/reportcard_2004/00exsummary.pdf) (October 28, 2004).

171. B. Delworth Gardner, *Transfer Restrictions and Misallocation in Grazing Public Range*, 44 J. of Farm Econ. 33 (1962).

172. Robert H. Nelson, *How to Reform Grazing Policy: Creating Forage Rights on Federal Rangelands*, 8 Fordham Env. Law J. 649 (1997).

173. Lorraine M. Egan & Myles J. Watts, *Some Costs of Incomplete Property Rights with Regard to Federal Grazing Permits*, 74 Land Econ. 171-186 (1998).

174. Karl Hess, Jr. & Johanna H. Wald, *Grazing Reform: Here's the Answer*, High Country News (Oct. 2, 1995), [http://www.hcn.org/servlets/hcn.Article?article\\_id=1370](http://www.hcn.org/servlets/hcn.Article?article_id=1370).

175. Donald R. Leal, ed., *Conservative Conservation: Policy Proposals for a New Century* 16-17, <http://www.perc.org/pdf/conservation.pdf> (1995); See also John A. Baden, *A Modest Idea to Create*



rights are established, the "use it or lose it" grazing requirement would be eliminated, so that the permit holder could determine the use of the land within certain constraints. The base property ownership requirement might also be eliminated so that ranchers or other users not adjacent to the allotment could still compete for the permit. The requirement that the permit holder be in the livestock business could also be eliminated so that environmental and recreation groups could acquire forage rights. Eliminating subleasing restrictions would offer more flexible use of the allotment to take advantage of the diversity and quality of the resources.<sup>176</sup> These changes would move government policy away from mandated livestock grazing, and allow the market to determine the "proper use" of the public lands.<sup>177</sup> Better land management practices will follow "secure, well-defined, and transferable property rights for those who use the public range, be they a private ranch or the Nature Conservancy Trust."<sup>178</sup> However, the Bush Administration has chosen not to pursue these policy changes. "[I]nstead of promoting a market approach to the grazing issue, the Bush Administration has chosen to make only marginal changes in regulations."<sup>179</sup>

## VI. ANALYSIS

### A. Keeping Public Lands Off the Agenda

In the confrontation between the President's cowboy capitalism and the welfare ranching status quo, cowboy capitalism seems to have withered. Despite his ideology, Bush did not prioritize or even address market-oriented grazing reform. Since public lands grazing occurs only in eleven western states, general public interest in the issue remains low. In 1975, two authors described "Lands No One Knows," arguing that the public was uninformed and uninterested in public land.<sup>180</sup> Since then, demographic trends in the west, like population growth, have created more interest and conflict over public lands, making them once again contested plains. In-

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*Balance in Range Reform*, Seattle Times (Nov. 17, 1993) at <http://www.freeeco.org/articleDisplay.php?id=328>.

176. Nelson, *supra* n. 172, at 672 (proposals summarized); See also Alderson, *supra* n. 146; Forrest, *supra* n. 147; Terry A. Anderson & Donald R. Leal, *Free Market Environmentalism* (rev. ed., Palgrave MacMillan 2001); Jerry L. Holechek & Karl Hess, "Free Market Policy for Public Land Grazing," *Rangelands*, April 1994, pp. 63-67.

177. Nelson, *supra* n. 172.

178. Baden, *supra* n. 175.

179. Terry A. Anderson, *Grazing on Public Lands*, in Randle & Shaw, *supra* n. 170, at 58. Ironically, the Clinton Administration's 1997 Economic Report of the President argued for "increasing the transferability" of forage rights so that non-ranching interests could compete to acquire grazing permits: "Users of Federal public lands should be more exposed to market signals, so that their decisions will help maximize economic welfare for all." 1997 *Economic Report of the President* 223-224, <http://www.umsi.edu/services/govdocs/erp/1997/chap6.pdf> (1997).

180. T. H. Watkins & Charles S. Watson, Jr., *The Lands No One Knows: America and the Public Domain* (Sierra Club Books 1975).

creasing urbanization has created demands for recreation and other non-forage uses.<sup>181</sup> Survey research indicates a general public preference, even in grazing states, to shift rangeland management away from a livestock grazing emphasis and toward protection of “nonmarket” resources. Local residents of specific rangeland regions, however, are more supportive of livestock grazing, which they see as a tradition and way of life that ought to be protected.<sup>182</sup> Public land issues are seldom mentioned because they affect such a narrow segment of the public.<sup>183</sup> Although the public is generally supportive of shifting land uses away from ranching, the issue is not a public priority. President Bush faced little public pressure to include grazing reform on his policy agenda, and the desire to avoid escalating the controversy in Republican-leaning states undercut any incentive to act aggressively.

### B. *Special Interest Politics*

Apart from public opinion, special interest groups are a political force to which the President responds. The power of Bush’s market-oriented grazing constituency to apply political pressure, create incentives, or provide rewards or punishment is limited. Ranching advocates working on behalf of special interests, however, have long had hefty political clout. Most of these lobbyists are from states that serve as Republican strongholds in the presidential election. In 2000, Bush lost the national popular vote, but carried seven out of eleven public lands grazing states.<sup>184</sup> Ranching lobbyists, like the NCBA, are important political players.

According to its press releases, the NCBA is “the largest organization representing America’s cattle industry,” and the industry leader in “influencing public policy to improve producer profitability and in preserving the

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181. Larry W. Van Tassell, L. Allen Torell, & Neil R. Rimbe, *Grazing on Public Lands in the 21<sup>st</sup> Century*, New Mexico State University Research Report 737 (2001); See also Jerry L. Holechek, *Western Ranching at the Crossroads*, 23 *Rangelands* 17 (2001).

182. Mark W. Brunson & Brent S. Steel, *Sources of Variation in Attitudes and Beliefs About Federal Rangeland Management*, 49 *J. of Rangeland Mgt.* 69 (1996); Mark W. Brunson & Brent S. Steel, *National Public Attitudes Toward Federal Rangeland Management*, 16 *Rangelands* 2, pp. 77-81 (1994); *Livestock Grazing on Public Lands*, 7 Q. Profile of New Mexico Citizens: A U. of N.M. Inst. for Pub. Policy Survey Research Center Rep. 3 (1995); *Range Reform in New Mexico*, 6 Q. Profile of New Mexico Citizens: A U. of N.M. Inst. for Pub. Policy Survey Research Center Rep. 1 (1994); James A. DeLoney, *Nevada’s 2003 Statewide Comprehensive Outdoor Recreation Plan—Assessment and Policy Plan* Ch. 4, <http://www.parks.nv.gov/Scorp/Chapter%204%20Public%20Opinion%20on%20Public%20Land%20Mgt.pdf> (Mar. 2004).

183. Pew Research Center, *Issues and Continuity Now Working for Gore*, <http://people-press.org/reports/display.php3?ReportID=33> (Sept. 14, 2000); Pew Research Center, *Economy Now Seen Through Partisan Prism: Emerging Priorities for ‘06 Energy, Crime and Environment*, <http://people-press.org/reports/display.php3?ReportID=268> (Jan. 24, 2006); Joseph Carroll, *Environment Not Highest-Priority Issue This Election Year*, *The Gallup Poll*, <http://www.gallup.com/Poll/Releases/pr000925.asp> (Sept. 25, 2000).

184. Bush lost the Democratic-leaning and more urbanized Pacific coast states of California, Oregon, and Washington, along with New Mexico.

industry's heritage and future."<sup>185</sup> However, the NCBA blurs the line between public and private land, arguing that "public lands have become part of the economic base and cultural heritage of western communities."<sup>186</sup> The NCBA describes ranching on public land as a "positive partnership between federal agencies and western livestock operators," and claims that "ranchers serve as public land managers, helping government agencies cut costs and meet resource objectives."<sup>187</sup> The NCBA is dedicated to maintaining the integration of public lands with private ranches: "[w]e want producers to know we are finding ways to make it easier and more economically viable for livestock producers to operate their ranches with federal lands as part of their forage base."<sup>188</sup>

Part of the NCBA's effort to protect the profitability of ranching on public lands has been to contribute hundreds of thousands of dollars to Republican and Democratic election campaigns in western states. The group has spent comparable sums lobbying Congress, the White House, and the agencies.<sup>189</sup> The NCBA claimed a political ally in President Bush. In 2004, it supported his re-election, formally endorsing a presidential candidate for the first time in its 106 year history. It claimed this was necessary because "the policies of President Bush and those of his Administration most closely match the policies of the NCBA. . . . President Bush will continue to protect the rights of grazing permittees."<sup>190</sup> After his re-election, the NCBA lobbied hard for the BLM to change the grazing rule: "[w]e are grateful to the Bush Administration for *taking a step* toward a regulatory system that will better enhance the business climate for our nation's public lands ranchers."<sup>191</sup> President Bush and members of his administration have spoken at a number of NCBA annual conferences.<sup>192</sup>

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185. The language is standard in National Cattlemen's Beef Association press releases, at [http://www.beefusa.org/theanationalcattlemen\\_sassociation.aspx](http://www.beefusa.org/theanationalcattlemen_sassociation.aspx) (last accessed April 31, 2008).

186. National Cattlemen's Beef Association, *Grazing Programs*, <http://www.beefusa.org/goveGrazingPrograms.aspx> (last accessed April 31, 2008).

187. *Id.*

188. NCBA, *Public Lands Council Asks Grazing Permit Holders Nationwide: Support Aggressive Efforts to Preserve Our Livelihood*, <http://www.beefusa.org/NEWSPublicLandsCouncilSupportEffortsToPreserveOurLivelihood-6150522348.aspx> (June 16, 2005).

189. The Center for Responsive Politics data base includes NCBA contributions to federal candidates and parties (76 percent to Republicans), as well as lobbying expenditures (\$131,330 as of March 31, 2008). See <http://www.opensecrets.org/pacs/lookup2.asp?strID=C00028787&cycle=2008>.

190. NCBA, *NCBA Policy Division Says Bush is the One*, <http://www.beefusa.org/NEWSNCBAPolicyDivisionSaysBushistheOne3486.aspx> (Aug. 13, 2004).

191. NCBA, *Public Lands Ranchers Applaud BLM's Efforts to Strengthen Grazing*, <http://www.beefusa.org/NEWSRanchersApplaudBLMsEffortstoStrengthenGrazing-6170522356.aspx> (June 17, 2005). The NCBA issued a lengthy criticism of the Idaho District Court's decision enjoining the regulations. See Jeff Eisenberg, *Memo. to PLC and NCBA*, <http://thewesterner.blogspot.com/2007/06/june-21-2007-memorandum-from-jeff.html> (June 21, 2007).

192. *President Bush Speaks at NCBA Conference*, Farm Futures: Political Daily at <http://www.politicaldaily.org/link.asp?ID=182925&Title=President%20Bush%20Speaks%20at%20NCBA%20Conference> (March 28, 2007).

Livestock associations like the NCBA have cultivated congressional allies in western states. Many of these legislators hold important leadership and committee positions, including New Mexico Republican Senator Pete Domenici, the ranking member and former chair of the Senate Energy and Natural Resources Committee that helped scuttle grazing reforms pushed by the Clinton Administration. These alliances reflect long-standing relationships between members of Congress and ranching interests. According to Layzer, “[b]y the early 1970s[,] ranchers’ congressional allies had achieved firm control over the public lands authorizing and appropriating subcommittees in both chambers.”<sup>193</sup> Bush was not interested in challenging or alienating these ranchers and their congressional allies as he pursued other policy reforms that required support from western congressional delegations.

Environmental organizations are usually special interest groups that seek to drastically curtail or eliminate grazing on public lands. These groups are not typically part of the Republican base, and have achieved mixed results by opposing the new policies. According to the Sierra Club, almost all commercial grazing is “not appropriate on federal public lands.”<sup>194</sup> The Center for Biological Diversity (“CBD”) claims that “grazing is an expensive and wasteful use of our spectacular public lands. . . . [E]liminating livestock grazing on public lands would make an enormous difference in the recovery of imperiled species, in water and watershed quality, [and] in the abundance of wildlife.”<sup>195</sup> The CBD argued that the new Bush grazing regulations would “allow the fox to guard the henhouse,” and leave other interested parties “without recourse as soils, water, vegetation and imperiled species suffer from the exploitation of our public lands.”<sup>196</sup> The Forest Guardians also criticized the regulatory proposals: “[t]he push by the Bush administration for new handouts to the livestock industry threatens clear water and public land that should be available to feed and house declining wildlife populations.”<sup>197</sup> The National Wildlife Federation asserted, “the proposed rules are especially damaging because they will disenfranchise

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193. Judith Layzer, *Federal Grazing Policy: Some Things Never Change, The Environmental Case: Translating Values Into Policy* 184 (2nd ed., CQ Press 2006); See also Klyza, *supra* n. 47 (on this relationship); See Gerald A. Fennemore & Jon P. Nelson, *Western Rangelands Reform: An Analysis of the 1996 Senate Vote on Federal Grazing Fees*, 19 Contemporary Econ. Policy 322 (2001) (analysis of the influence of ranching interests on Senators’ votes).

194. Sierra Club, *Federal Public Lands Grazing Policy*, <http://www.sierraclub.org/policy/conservation/grazing.asp> (Sept. 24, 2000).

195. Center for Biological Diversity, Press Release, *GAO Finds Public Lands Grazing in the Red: Budget Deficit at Least \$123 Million Annually*, <http://biologicaldiversity.org/swcbd/press/grazing10-31-05.html> (Oct. 31, 2005).

196. Center for Biological Diversity, Press Release, *U.S. Bureau of Land Management’s New Regulations Undercut Public Participation and Threaten Wildlife and Water With hand-Outs to the Livestock Industry*, <http://www.biologicaldiversity.org/swcbd/press/grazing6-16-05.html> (June 16, 2005).

197. Forest Guardians, Press Release, *U.S. Bureau of Land Management’s New Regulations Undercut Public Participation and Threaten Wildlife and Water With hand-Outs to the Livestock Industry*, <http://www.fguardians.org/library/paper.asp?nMode=1&nLibraryID=46> (June 16, 2005).

the public, and further entrench destructive livestock grazing on BLM lands."<sup>198</sup>

The environmental groups have influenced some western legislators, and federal agencies, but they are not part of the Republican constituency and have been active opponents of Bush Administration. As a result, they have not been able to change the status quo.

### C. *The Bureaucratic Status Quo*

President Bush has echoed long standing justifications offered in defense of the bureaucratic status quo, including claims that subsidies and regulations protect a traditional western way of life, support rural economies, and check suburban sprawl by protecting open space. The Administration's adoption of traditional arguments reflects unwillingness to challenge the status quo. A new administration inherits a regulatory regime and a bureaucracy with an investment in existing arrangements. The bureaucrats often have close relationships with the interests they regulate and the congressional committees that authorize and fund their programs.<sup>199</sup> Because the status quo is written into the bureaucratic culture and practiced by professionals in government, industry, and academia, changing it is difficult.<sup>200</sup> "Agencies and their personnel inevitably have narrower perspectives than the White House and will desire to maintain and expand their programs, status, and influence. Those ambitions often bias the options and information presented to the White House."<sup>201</sup>

When the BLM initially announced the proposed rule changes, Director Clarke reiterated the agency's commitment to grazing on public lands, recognizing "the economic contributions and social value of ranching."<sup>202</sup> The USFS has expressed a similar view: "[m]any rural communities continue to be dependent upon ranching for their economic livelihood and most of these ranches rely on federal land grazing. . . . It is the goal [of the USFS] to conserve the rich resources of the National Forests and Grasslands while supporting communities greatly dependent upon these very same resources."<sup>203</sup> Secretary Norton also came to represent the most conservative elements in the DOI. Regarding proposed regulatory changes, she said:

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198. National Wildlife Federation, *New Grazing Rules Threaten Wildlife and Habitat on America's Public Lands*, <http://www.nwf.org/wildlife/pdfs/GrazingRules.pdf> (Last accessed April 31, 2008).

199. Burdett A. Loomis and Allan J. Cigler, "The Changing Nature of Interest Group Politics," *Interest Group Politics*, pp. 1-32 (5<sup>th</sup> ed., 1998).

200. John Tierney and William Frasure, "Culture Wars on the Frontier: Interests, Values, and Policy Narratives in Public Lands Policies," *Interest Group Politics*, pp. 303-326 (5<sup>th</sup> ed. 1998).

201. George C. Edwards III & Stephen J. Wayne, *Presidential Leadership: Politics and Policymaking* 246 (5<sup>th</sup> ed., Wadsworth Publ. 1999).

202. BLM, *Interior Secretary Announces Proposed Grazing Rule That Would Improve Grazing Management, Help Continue Public Lands Ranching*, [http://www.blm.gov/nhp/news/releases/pages/2003/pr031205\\_grazing.htm](http://www.blm.gov/nhp/news/releases/pages/2003/pr031205_grazing.htm) (Dec. 5, 2003).

203. USFS, *Why Does the Forest Service Permit Livestock Grazing on NFS Lands?*, <http://www.fs.fed.us/rangelands/uses/allowgrazing.shtml> (Mar. 12, 2007).

"We all know there are people out there who want to end public grazing. President Bush is not one of them, and I am not one of them. This administration is going to do everything possible to ensure that public lands' ranching continues to exist for generations to come."<sup>204</sup>

Reiterating the traditional rationale for grazing on public lands may reflect a sincere commitment to public lands ranching, or a response to traditional bureaucratic politics. The Administration's statements supporting public lands grazing on traditional grounds reflect a sincere commitment to industry, yet conflict with the free-market rhetoric. The Administration's willingness to support the status quo and sacrifice its ideology to the traditional arrangements may reflect a practical political calculation.

#### D. *The Statutory Status Quo*

Presidents inherit a statutory framework that limits their ability to change policy. As Charles Jones argues, "presidents enter a government already at work."<sup>205</sup> However, existing statutes do provide some latitude, and Bush could have pushed harder within the existing statutory framework to allow market forces to play a bigger role in public land use decisions. Bush may have chosen not to risk an open debate on ranching policy given the political climate during his Presidency. An affinity or sympathy for the ranching industry possibly carried more weight with Bush than his free enterprise ideology.

### VII. CONCLUSION

President Bush entered office having expressed an ideological view critical of government planning and regulation and supportive of free markets called "cowboy capitalism." He inherited a public lands grazing policy that valued grazing above other uses by permitting private livestock operators to use public land under certain conditions and regulations. This policy established a status quo that was rationalized by decision makers to protect and subsidize an industry with deep roots in western rural communities. It was characterized by critics as "welfare ranching."

Although President Bush's record was mixed, politics trumped ideology, and he generally favored welfare ranching over cowboy capitalism. In its early years, his Administration appeared willing to challenge the traditional command-and-control system of mandating specific land uses by allowing ranchers to voluntarily sell grazing permits to non-grazing users. In the end, however, the Administration insisted that allotments must be grazed,

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204. Gale Norton, Speech, *Remarks prepared for Delivery to the 85<sup>th</sup> Annual Meeting of the American Farm Bureau Federation*, (Jan. 11, 2004) (transcr. available at <http://www.doi.gov/news/040111hawaii>).

205. Charles O. Jones, *Separate But Equal Branches: Congress and the Presidency* 78 (Chatham House Publishers 1995).

and traditional grazing policies prevailed. Accordingly, the Bush Administration's regulatory reform efforts merely aimed to ease the regulatory burden on ranchers, not subject the industry to market-oriented land use reform. The Administration did consider statutory reforms of grazing policies, but the fact that these statutory reforms were not especially bold and did not become legislative proposals reveals that the Administration had other priorities. Even if they had gone forward, these reforms would not have reflected market-determined priorities. For the moment, efforts to reform grazing policies have now been largely abandoned.