

ENVIRONMENTAL COMMAND AND CONTROL: THE SNAKE IN THE PUBLIC LANDS GRASS

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Conservation means harmony between men and land. When land does well for its owner, and the owner does well by his land, when both end up better, by reason of their partnership, we have conservation.

Aldo Leopold (1886–1948)

Today's ranchers find themselves surrounded by controversy. They are at once revered as the embodiment of the American mythos of the old West and hated as a stubborn bastion of natural resource abuse. Ranchers prefer to be seen simply as hardworking businessmen and businesswomen who produce valuable commodities. The cycle of the seasons, life and death, family tradition, and economic sacrifice sculpt and test the ranchers' mettle in the same fashion that the unrelenting forces of nature create the rugged beauty of the American West. Otherwise, however, the stereotypes have little to do with the harsh realities of modern ranching.

Today's ranchers must master many trades in order to keep the home place. Long gone are the days when wealthy cattle barons from the East or Europe could buy livestock by the herd and turn them out on the open range until fattened for the drive to market. The modern rancher must be a competent range scientist, an economist, veterinarian, hydrologist, meteorologist, CEO, CFO, market analyst, good ol' fashion horse trader—and occasionally lucky.

But even this is insufficient for the western rancher utilizing federal lands as an integral part of his operation. He or she must now be every bit the skilled and media-savvy lobbyist, for it is in Congress, in the executive branch, and ultimately in the vagaries of public opinion that his destiny will be determined. As this chapter discusses, although ranchers have an impressive record of environmental stewardship, regulators and professional environmentalists too often insist on treating ranchers as the enemy—and, by so

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doing, they not only miss an opportunity to work with ranchers to better protect the environment, but actually create anti-environmental incentives for ranchers.

I. Background: The Rancher as Environmental Steward

Historical Setting

Any discussion of western ranching and environmental law must be properly ensconced in the historical setting. Rarely do either ranchers or environmentalists¹ relate this history during debate over land use, yet it is crucial if one is to understand the issues.

To begin with, history provides an understanding of today's land ownership patterns. The federal government owns 47% of the West.² This ranges from a high of 83% of Nevada to a low of 28% of Montana.³ Add those lands owned by state and local governments, and precious few acres are left for private ownership. This is in stark contrast to federal ownership of other states such as New York (0.7%) or Texas (1.3%).⁴

The patterns of ownership involve more than the gross percentages of federal title, however. The realities of current land ownership powerfully illustrate why so many ranchers are distraught over many of today's environmental protection proposals. Ranchers and the federal government are not physically able simply to ignore each other. They share many thousands of miles of common border, and land management by one invariably affects the other. Contrary to popular belief, federal rangelands are not "blocked up" into neatly defined areas such as Department of Defense and National Park Service lands. "Checkerboard" lands, for instance, best exemplify the intermingled nature of public and private ownership: only every other square mile, for ten miles on each side of railroad rights of way, is privately held. These and other lands of dispersed ownership are very common with national forest lands and, especially, Bureau of Land Management lands. The resulting mosaic

¹Ranchers rightfully consider themselves to be environmentalists since their livelihood depends on careful stewardship of the physical environment of their ranch. In this chapter, however, the term will denote that class of special-interest groups that claim the moniker as their own—the Sierra Club, National Wildlife Federation, National Audubon Society, etc.

²CONGRESSIONAL RESEARCH SERVICE, PERCENTAGE OF FEDERAL LANDS BY STATE AS OF SEPTEMBER 30, 1990 (undated). The West is defined in this chapter as the 11 western contiguous states: Washington, Oregon, California, Idaho, Nevada, Montana, Wyoming, Utah, Colorado, New Mexico, and Arizona.

³*Id.*

⁴*Id.*

greatly complicates land management and in many instances prevents individuals from owning sufficient private acreage for ranching.

What are the origins of the current system of western land use and ownership? It began in 1540 when Spanish explorer Francisco Vasquez de Coronado introduced domestic livestock to America's southwest region while looking for the fabled Seven Cities of Gold.⁵ This modest beginning eventually led to millions of cattle and sheep across the West when the Civil War began.⁶ The growth of herds coincided with access to open range. As America grew westward, the federal government never intended to retain control over lands in the newly acquired public domain. To the contrary, Washington was eager to settle those territories in order to forestall claims by other sovereigns such as Spain and France. The Homestead Act of 1860 worked quite well for these purposes, at least in the great basin between the Appalachians and the Rockies. As long as the land was arable, homesteaders quickly laid claim to the 160 acres offered by Uncle Sam under the Act. This acreage was thought to be sufficient to support a family farm, and in much of the Midwest it was.⁷

The system completely broke down in the arid West, however. First, the lack of moisture greatly restricted opportunities for farming without the difficult task of irrigation, and extreme temperature ranges and inhospitable topography greatly complicated that task. Lands west of the 100th meridian were therefore ill-suited for traditional row-crop farming. But equally apparent, fortunately, was the successful utilization of native grasses by resident ungulates such as bison and elk. Settlers therefore followed nature's example by raising livestock, in combination with some supplemental farming in the alluvial valleys and riparian areas.

Uncle Sam's offer of 160 acres tempted the unwary settler westward but provided precious little acreage for anything resembling viable agriculture. Opportunistic settlers simply homesteaded the best land—near water sources and transportation routes, out of the wind and off the mountain—and utilized the open range as necessary.⁸ As settlements increased and pressure for open range grew, so did the "tragedy of the commons." These were the days of legendary cattle drives when cattle (or sheep) would eat their

⁵NATIONAL RESEARCH COUNCIL, *RANGELAND HEALTH: NEW METHODS TO CLASSIFY, INVENTORY, AND MONITOR RANGELANDS* 20 (1994). Coronado is credited with introducing 500 cattle, 5000 sheep, and 1000 horses.

⁶*Id.*

⁷DOUGLAS PRESTON, *CITIES OF GOLD* 194 (1992).

⁸William Myers, Testimony at Public Hearing on Rangeland Reform '94, at 20 (June 8, 1994).

way north or south or to railheads without regard for overgrazing. Range seemed endless and little incentive existed to consider sustained use of the land, since the probability of grazing the same acreage was remote except at passes or along established trails. As America moved into the twentieth century, the government encouraged overproduction (i.e., overgrazing) to supply a growing nation with meat, wool, and leather. Demand for these basic commodities was accelerated as part of the World War I effort.

The five years preceding the passage of the Taylor Grazing Act⁹ in 1934 exacerbated the environmental damage to the range.¹⁰ These years were host to the worst recorded drought and plummeting cattle prices. Consequently, more cows were being held from market and left to graze on depleted lands.¹¹ This abuse of the land, while poor management practice, was completely legal.¹²

The Taylor Grazing Act was the first major attempt to regulate grazing on the public domain.¹³ The purpose of the Act was twofold: to prevent the degradation of rangeland resources and to promote the stabilization of the domestic livestock industry.¹⁴ Ranchers witnessed the problems first and felt the impact personally. The livestock industry helped draft and worked hard for passage of the statute because it recognized the need for economic stability through environmental protection of the resource. Through the Act, ranchers were given a "preference" for a number of their livestock to use the land. A permit system, which continues today, established the number of animals that the land could "carry" and was issued only to ranchers with sufficient "base" property or water rights to utilize legitimately the associated federal land. Thus ended the days of the roaming herds and absentee cattle barons.

This history is more than a relic of the past. Then, as now, the amount of native grasslands required for domestic livestock necessitated access to very large tracts of land. On Bureau of Land Management lands, an average of 11.1 acres can sustain one cow

⁹43 U.S.C. §§ 315 et seq. (1934).

¹⁰Myles J. Watts & Jeffrey T. LaFrance, *Cows, Cowboys, and Controversy: The Grazing Fee Issue*, in *MULTIPLE CONFLICTS OVER MULTIPLE USE* 59, 61 (Terry L. Anderson ed., 1994).

¹¹*Id.*

¹²The Supreme Court held as early as 1890 that ranchers had an implied license to use the public domain, subject only to use by homesteaders. *Buford v. Houtz*, 133 U.S. 320 (1890).

¹³The inaugural attempts to regulate federal lands grazing occurred with the passage of the Organic Administration Act of 1897, which by implication allowed the Secretary of the Interior to establish grazing permits as early as 1901. David Abelson, Comment, *Water Rights and Grazing Permits: Transforming Public Lands into Private Lands*, 65 U. COLO. REV. 407, 413 (1994).

¹⁴*Red Canyon Sheep Co. v. Ickes*, 98 F.2d 308 (D.C. Cir. 1938).

and her calf for a month.¹⁵ On Forest Service lands, 12.7 acres are required.¹⁶ If a settler had homesteaded 160 acres of average Forest Service land and kept livestock on the place year round, his herd would have been limited to that one cow/calf pair!¹⁷ This reality exists today and necessarily makes private ranches dependent upon access to federal forage in order to retain any semblance of economic viability. The public, in turn, receives the benefits of commerce and the production of new wealth.

The vast majority of Americans—both urban and rural—are unable to depict today's "average" ranch or rancher. While the vast geographic distribution of the industry makes generalizations difficult at best, some generalities are instructive. Today American rangelands cover approximately 770 million acres.¹⁸ Approximately 331 million of those acres are under federal control, and of these some 270 million are administered for livestock grazing.¹⁹ While the industry suffers under unprecedented regulatory burdens and faces the inevitable cycles of fluctuating market prices and interest rates, the system of ranching continually improves in concert with modern science and business practices, and several demographic characteristics remain stable. A recent survey found that the average western rancher who uses federal lands has been in business on the same ranch for thirty-one years with an average of thirty-five years of experience in the business. This average fellow is fifty-five years old and commutes thirty-five miles one way to town to conduct business.²⁰

It is also important to understand who the rancher is not. Frequently opponents to the current system of range management assume that the federal-lands rancher is better off than ranchers whose land holdings and operations are entirely private. The fact is, however, that in comparison to his counterpart who ranches in the West on wholly private land, the federal-lands rancher: makes less money per animal; incurs higher labor and feed costs; has higher interest costs per animal unit, fewer dollars available for investment in restocking herds; higher fixed costs per animal, lower net operating income per animal, and a significantly lower economic rate of return on his investment; and owns a significantly lower and declining ranch market value per animal.²¹

¹⁵JOHN FOWLER ET AL., ECONOMIC CHARACTERISTICS OF THE WESTERN LIVESTOCK INDUSTRY 9 (1994).

¹⁶*Id.*

¹⁷12.7 acres per month for one cow/calf pair times 12 months equals 152.4 acres necessary for a year of food for that cow and calf.

¹⁸NATIONAL RESEARCH COUNCIL, *supra* note 5, at 18.

¹⁹*Id.*

²⁰FOWLER ET AL., *supra* note 15, at 3.

²¹GERHARD N. ROSTVOLD & THOMAS J. DUDLEY, A COMPARATIVE ANALYSIS OF THE ECONOMIC, FINANCIAL AND COMPETITIVE CONDITIONS OF MONTANA RANCHES USING FEDERAL FORAGE AND MONTANA RANCHES WITHOUT FEDERAL GRAZING ALLOTMENTS (1993).

Condition of the Range Today

History and experience have taught ranchers to be good environmental stewards. Most ranchers take good care of the land for basic reasons. They understand and respect the forces of nature far better than those in the ivory tower or asphalt jungle who would denigrate their environmental awareness. Failure to understand and respect natural forces is the quickest way to end a ranching career. Life's basics of water, food, shelter, birth, and death constitute the fundamentals of ranching. Environmental awareness is nothing more than common sense for the rancher.

Environmental stewardship is, in other words, good business. If a rancher allows his stock to overgraze his assigned federal allotment this summer, he must face the consequences next summer by reducing his herd, running them on the allotment for a shorter season, or accepting lower weight gain, any of which are bad for the bottom line. The Environmental Protection Agency recognizes and agrees with this basic economic precept. As noted in a document produced for EPA and published after agency review and approval, "Improper grazing reduces the amount of forage produced on [ranchers'] most productive land. You lose money."²²

Environmental stewardship is also good citizenship. Numerous federal and state statutes proscribe practices—ranching or otherwise—that may harm the environment. Ranchers as a group may be fairly labeled as conservative and law-abiding. This extends to environmental laws.

Finally, ranchers earnestly love the land. They have a long-term desire to improve the range and pass it to the next generation in better condition than when they started out.

There is much evidence confirming that ranchers care for the land and are environmentally sensitive. The regulatory agencies are themselves a good source. In a memorandum from the Department of the Interior's Director of Communications to Secretary Bruce Babbitt, written during the height of the grazing reform initiative, senior departmental officials admitted, "Our own statistics can be used to show the range is in better shape than at any point in this century."²³ The Department of Agriculture reached the same conclusion.²⁴ Secretary Babbitt publicly acknowledged

²²ED CHANEY ET AL., *MANAGING CHANGE: LIVESTOCK GRAZING ON WESTERN RIPARIAN AREAS* 6 (1993).

²³Memorandum from Kevin Sweeney, Assistant to the Secretary and Director of Communications, and Lucia Wyman, Director for External Affairs, Department of the Interior, to Secretary of the Interior Bruce Babbitt, Chief of Staff Tom Collier, and BLM Director Jim Baca (June 23, 1993).

²⁴See *Management of Grazing Uses Within Rangeland Ecosystems*, 59 Fed. Reg. 22,074 (1994).

this reality during field hearings of the U.S. Senate Committee on Energy and Natural Resources. The Secretary agreed that grazing actually improves the ecology and wildlife habitat of public lands. As he said, "Grazing is in fact an enduring, important, positive part of the West's landscape."²⁵ President Clinton reiterated the point shortly thereafter when he stated in a letter to concerned Senators and Representatives, "And, I want to emphasize, as I have many times, that livestock grazing on public lands is an important land use that must be protected and preserved."²⁶ The President's conclusions are bolstered by additional agency documentation.²⁷

Range scientists from a number of land-grant universities have reached the same conclusion. For example, Dr. J. Wayne Burkhardt, Professor Emeritus, University of Nevada School of Range Management, has written, "It is ecologically and biologically proper that this country's rangelands be used by livestock. Grazing takes very little from the public lands and when properly managed is good for plants, good for wildlife, and good for public forage."²⁸ It should be noted that range management has become a well-established field of science with over forty universities offering courses in it. The Society for Range Management was founded in 1948 for the express purpose of developing an understanding of range ecosystems and the principles applicable to the management of range resources. The creation of a strong agricultural research system, combined with the practical experience of the ranching community, has led to a network of practicing range scientists whose work supports a sustained yield of forage in an environmentally sound manner.²⁹

The industry itself promotes environmentally sound ranching practices through such programs as the National Cattlemen's Association's Environmental Stewardship Award Program. Under this program, the beef cattle industry, in concert with environmental organizations such as the Sierra Club and The Nature Conservancy,

²⁵Christopher Smith, *Babbitt Sees Common Ground on Grazing*, SALT LAKE TRIB., July 12, 1994, at A1.

²⁶Letter from President Bill Clinton to Sen. Conrad Burns (Aug. 10, 1994).

²⁷See, e.g., BUREAU OF LAND MANAGEMENT, PUBLIC LAND STATISTICS—1992 (1993); COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL QUALITY—22ND ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY (1992).

²⁸PUBLIC LANDS COUNCIL ET AL., HIGH NOON ON THE RANGE 24 (1992). See also G.E. GRUELL, FIRE AND VEGETATION TRENDS IN THE NORTHERN ROCKIES: INTERPRETATIONS FROM 1971–1982 PHOTOGRAPHS (1983) (USDA Forest Service General Technical Report INT-158); K.L. JOHNSON, RANGELANDS THROUGH TIME: A PHOTOGRAPHIC STUDY OF VEGETATION CHANGE IN WYOMING 1870–1986 (1987) (University of Wyoming Agricultural Experiment Station, Misc. Publication 50).

²⁹JOHNSON, *supra* note 28.

provides national recognition for progressive environmental practices among the nation's cattle producers. Research undertaken by the livestock industry has confirmed that sheep grazing also clearly enhances natural resources and is an important range tool for the improvement of wildlife habitat, management of wildfire, silvicultural management, and weed control.³⁰

II. "I'm from the Federal Government and I'm Here To Help You"

It is against this background that the federal government supposedly oversees the environment on behalf of the citizenry. Yet its endless promulgation of statutes and regulations harms the very environment it purports to protect. The government creates perverse incentives for ranchers and refuses to work with them, despite ranchers' strong instinct toward environmental stewardship. The regulatory agencies of the executive branch and Congress share the blame, as discussed in the following two sections.

The Executive Branch: Regulation and the Rancher

Every administration spews forth its share of regulations, as the burgeoning *Federal Register* shows. The best that can be said of the current administration is that it is certainly no exception. Two recent regulatory initiatives, in particular, purport to help the rangeland environment in a variety of ways, but have an actual impact that belies their stated purpose.

"Rangeland Reform '94"

A prime example is a series of draconian regulations pleasantly entitled "Rangeland Reform '94," which is intended to "make the [Bureau of Land Management's] rangeland management program more consistent with ecosystem management, to accelerate restoration and improvement of the public rangelands, to obtain for the public fair and reasonable compensation for the grazing of livestock on public lands, and to streamline certain administrative functions."³¹ The Forest Service contends that the proposed rules are "more responsive to the current need for improved management

³⁰For further discussion, see the 1994 special issue of the *Sheep Research Journal*, collecting nine essays by various authors on "The Role of Sheep Grazing in Natural Resource Management" (Maurice Shelton ed.).

³¹Department Hearings and Appeals Procedures; Cooperative Relations; Grazing Administration—Exclusive of Alaska; Proposed Rule, 59 Fed. Reg. 14,314, 14,315 (1994).

of rangeland resources."³² The sixty-four pages of regulations contradict these laudable goals by adversely affecting the environment. The regulations are discussed in detail below, not only because of their importance per se, but also because their flaws are illustrative of the present federal regulatory regime.

These regulations, like so much environmental activity, are based on a misplaced assumption that if we would just leave nature alone, the West would return to a bucolic, pristine state in existence prior to settlement, eventually reaching a benign and peaceful equilibrium. For advocates of this view, a necessary step toward this utopia is the severe reduction or termination of federal lands livestock grazing.

The evidence suggests that this rendition of early America is mythical. In addition to compelling photographic evidence of modern range improvement,³³ we have the direct testimony of those pioneers and explorers who recorded their discoveries. Consider the words of explorer Francis Parkman in 1846:

But let [the traveler] be as enthusiastic as he may, he will find much to dampen his ardor As for food he must content himself with biscuit and salt provisions; for strange as it seems, this tract of country produces very little game Perhaps like us, he may journey for a fortnight, and see not so much as the hoof print of a deer; in the spring, not even a prairie hen is to be had.³⁴

Moreover, the notion of "unspoiled" natural expanses is appealing but scientifically irrelevant. Ecological science recognizes that natural systems are products of constant change and disturbance. Disturbance of rangelands is the natural state of affairs, whether that disturbance is physical (such as fire, drought, or erosion), or biological (such as herbivores, insects, or man).³⁵ Herbivory—grazing by large-bodied ungulates—has been a part of the natural disturbance regimes of the North American rangelands for millions of years.³⁶ The vast roaming herds of bison significantly "damaged" the rangelands. Herd movements dramatically altered the landscape through overgrazing, erosion, destruction of timber stands, and the like. Paradoxically, many environmentalists accept, and even encourage, damage to the resource if caused by bison or wild horses, but fully reject lesser impacts if caused by domestic herbivores, namely, cattle, sheep, and domestic horses.

³²Management of Grazing Uses, *supra* note 24.

³³See GRUELL and JOHNSON, *supra* note 28.

³⁴FRANCIS PARKMAN, THE OREGON TRAIL 35 (University of Wisconsin Press ed., 1969).

³⁵D. B. BOTKIN, DISCORDANT HARMONIES: A NEW ECOLOGY FOR THE TWENTY-FIRST CENTURY (1990).

³⁶S. W. Edwards, *Observations on the Prehistory and Ecology of Grazing in California*, 20 *FREMONTIA* 1 (1992); N. Owen-Smith, *Pleistocene Extinctions: The Pivotal Role of Megaherbivores*, 13 *PALEOBIOLOGY* 351 (1987).

We see this resource damage today in Yellowstone National Park, which is severely overgrazed by bison and elk. Similar range conditions in the neighboring Bridger-Teton National Forest would prompt revocation of grazing permits. Inside Yellowstone, however, it becomes the subject of roadside educational displays. The fact is that grazing by large herbivores—whether domestic or wild—is a functional part of rangeland ecology. The lack of such grazing would be unnatural. Parallels can be drawn to the use of fire as a resource management tool. Land managers know that both wild-fires and prescribed (domestic, if you will) fires are vital to rangeland health. As with grazing, disturbance of the landscape by fire may be considered “ugly” to the casual observer but is very much a part of the natural process.

With this background, it should be a matter of concern to environmentalists that countless ranchers have testified in town meetings, before Congress, and in public hearings that the regulatory regime of Rangeland Reform '94 will put them out of business. That means disruption of the symbiotic relationship between controlled grazing and the environment, the loss of which would be contrary to natural ecological processes of the rangelands.

This point can be demonstrated by looking at a few specifics of the regulations. *Four of the more egregious provisions that will hurt, not help, the environment include (1) ownership of improvements, (2) an increase in grazing fees, (3) the “national standards and guidelines,” and (4) water rights.* The first three will be briefly outlined here. Water rights deserve greater scrutiny and will be addressed in more detail.

Ranchers utilizing Bureau of Land Management lands are currently allowed to construct improvements on the federal range after consultation with local officials. The rancher provides labor, supplies, or both for construction of improvements such as water developments and corrals. The rancher then retains title to these improvements. Under this system of ownership, the rancher has an incentive to make the improvements and to maintain them. Water developments (springs, wells, reservoirs, stock tanks, and pipelines) have greatly benefitted wildlife.³⁷ They are an important source of water for birds and animals. In addition, they attract cattle and sheep away from riparian areas and thus minimize impacts on fish populations.

Under the administration's proposal, ownership of range improvements would vest in the United States.³⁸ The government

³⁷MICHAEL R. CONOVER, PERCEPTIONS OF AMERICAN FARMERS ABOUT WILDLIFE AND WILDLIFE DAMAGE ON THEIR FARMS AND RANCHES 5 (1994).

³⁸Department Hearings and Appeals Procedures, *supra* note 31, at 14,347.

contends that this is consistent with property law and the notion that the property owner should own all permanent improvements to that property.³⁹ It may be true that the government has the right to insist on title to these improvements but, as the landlord, it is foolish to do so. The consequences to the property are predictable, whether it is federal rangeland or an urban apartment. Ownership fosters stewardship. Transfer of title to the government will result in fewer improvements, less maintenance of existing improvements, and lower quality of improvements. Less water development will mean less wildlife and more damage to existing water sources.

Of all Rangeland Reform '94's proposals, the 100% increase in grazing fees paid by ranchers⁴⁰ has consistently generated the greatest public debate and the most media attention.⁴¹ This chapter need not address the merits, or lack thereof, of the proposed increase, but instead will focus on the environmental consequences of the proposed fee hike.

Any increase in the cost of ranching will of course adversely affect the ability of certain ranchers to stay in business. A fee hike will force some marginal ranches out of business immediately.⁴² Others suddenly become marginal. Marginal operators tend to conserve every penny and are less likely to spend funds on range improvements (especially if, per the other proposal just discussed, they will not retain title). Marginal operators are less likely to spend funds in compliance with agency mandates or to collaborate voluntarily with other interest groups for the betterment of the range. They are more likely to sell private holdings to developers to generate cash flow. A fair, economically sound fee formula would, conversely, enhance stewardship.

The proposed "national standards and guidelines" epitomize the fallacious belief that centralized government can promote environmentalism. The Interior Department implicitly conceded this point by dropping earlier proposals to dictate national standards for administration of grazing on federal lands.⁴³ Yet the Department retained proposed "fallback" regulations establishing strict minimum standards that must be adopted by the local agency officials before their plans will be deemed acceptable.⁴⁴ The minimum

³⁹*Id.* at 14,321.

⁴⁰*Id.* at 14,350-51; Management of Grazing Uses, *supra* note 24, at 22,094-98.

⁴¹Based on long-term media research conducted by the livestock industry for internal use (on file with author).

⁴²A medium-sized ranch with 300 cattle that graze 8 months of the year on federal land will pay an additional \$4,800 annually for the grazing permit if the fee becomes \$3.98/animal unit month as proposed. An animal unit month (AUM) is the amount of forage required to feed a cow and calf or five sheep or one horse for one month.

⁴³Department Hearings and Appeals Procedures, *supra* note 31, at 14,325.

⁴⁴*Id.* at 14,353-54.

requirements emanating from Washington mandate affirmative assistance for the recovery of threatened and endangered species⁴⁵ (a much higher standard than that which is contained in the Endangered Species Act itself⁴⁶), consideration of grazing seasons, water resources, minimum levels of perennial vegetation, livestock management practices, maintenance of herbaceous and woody species, as well as biomass and plant residue for stream sediment filtering and so forth.⁴⁷

Those criteria must be applied across some 180 million acres of grazing land administered by the federal Bureau of Land Management across fourteen states. These federal environmental commandments ignore the axiom of real property that no two parcels are alike. Each must be respected for its inherently unique elements. Efforts to manage them as a block ignore both natural and political limits. Moreover, who will judge compliance with the national standards and by what measurements? For instance, if the minimum standards require a certain height for grasses and monitoring indicates substandard height, who decides whether the cause is livestock grazing versus lack of moisture versus consumption by wildlife? These regulations will prove as unworkable in practice as they are untenable in theory.

Echoing its proposals affecting range improvements, the administration has proposed that, to the extent allowed by state law, rights for the use of water for the purpose of livestock watering on public land shall be "acquired, perfected, maintained, and administered in the name of the United States."⁴⁸ To persons unfamiliar with western water law and the arid nature of the West, this may seem fairly innocuous. In reality, this is perhaps the most scrutinized and contested provision in the entire proposal. Water is the lifeblood of the West. He who controls the water, controls the land. Other issues, even grazing fees, become secondary.

The rationale proffered by the administration carefully ignores the importance of water rights. It merely asserts that Bureau of Land Management policy must be made consistent with Forest Service practice (where water is much more abundant and much less critical) and BLM policy prior to the early 1980s.⁴⁹ BLM also tries to allay fears by explaining what the rule is *not* intended to accomplish. Fears have not been allayed.

⁴⁵Such unfunded federal mandates are not limited to the environmental areas, of course, and plague not only state and local governments but individuals as well.

⁴⁶The Endangered Species Act is discussed at greater length in chapter 7.—Editor's note.

⁴⁷Department Hearings and Appeals Procedures, *supra* note 31, at 14,353.

⁴⁸*Id.* at 14,348.

⁴⁹*Id.* at 14,322.

As is the case with range improvements, this proposal inhibits the development of water improvements because there is no guarantee that permittees would receive full beneficial use of their water developments. To fully understand this issue, however, a brief comment on western water law is in order.

Unlike the eastern part of the United States, in the West water is a very scarce commodity. Consequently, rules governing its development, diversion, and use differ from the riparian water law of the East. In the West, the "prior appropriation" doctrine creates property rights in water that can be transferred independently of the land from which the water arises or through which the water flows.⁵⁰ Whoever is first in time to use beneficially a quantity of surface water can file a claim with state authorities to perfect that right. Subsequent filers are "junior" or subordinate to these prior appropriations. In dry years, when there is not enough water to meet all claims on it, only those persons with sufficiently senior rights get the water. If a water use is abandoned or diverted for other than beneficial use, the appurtenant right can be lost.

Western water fights have raged for generations—across irrigation ditches and state lines, in the courts, legislatures, and agencies, both with and without violence. States jealously guard their power to administer permits for water within their borders. Not surprisingly, then, livestock permittees found powerful allies among Senators, Representatives, and governors when this proposal surfaced. The water rights issue dominated floor debate in the U.S. Senate during a successful filibuster to prevent even more restrictive language from becoming law through the Department of Interior's fiscal year 1994 appropriations bill.

The Rangeland Reform '94 water regulations would harm the environment by slowing installation of water improvements that create water sites where none existed and that draw livestock and big game away from riparian areas.⁵¹ The proposal has a much broader impact on the environment as well. In the particularly arid sections of the West, grazing permits are predicated on a rancher's ability to show that he or she controls sufficient water rights to maintain a viable ranching operation supportive of the livestock for which the permit would be issued. If water rights are transferred to the United States government, permittees may lose the ability to make this showing.⁵² This would lead directly to loss of the "base" private ranch property and the environmental benefits

⁵⁰WESTERN LIVESTOCK PRODUCERS ALLIANCE, TECHNICAL REVIEW OF RANGELAND REFORM '94, at 37 (1994).

⁵¹*Id.* at 36.

⁵²*Id.* at 38.

which that property bestows, namely open, undeveloped, and well-cared-for land synonymous with wildlife habitat.

"Implied" reserved wilderness water rights is a particularly significant water issue that could dramatically affect the ability of ranchers to utilize water for the benefit of both livestock and the environment. The administration published a notice of its intent to "reexamine" its position that federal agencies not file claims for water rights on lands designated by Congress as part of the National Wilderness Preservation System.⁵³ Generally, any reversal of policy would be for the purpose of maintaining in-stream flows for "historic" or aesthetic reasons. If the current policy is reversed, it will devastate water users, especially those upstream from designated wilderness areas who could find their seniority nullified. Much western water (and land) could be controlled through this policy change. For instance, the Platte River Wilderness Area in Wyoming and Colorado would control upstream water use on the North Platte River in north central Colorado. Implied wilderness water rights assigned to the Billy Creek Area on the Yellowstone River in southeastern Montana (currently administratively endorsed as suitable for wilderness designation) would control water use along 400 miles of the Yellowstone River. All water users along the tributaries of the Yellowstone such as the Tongue, Big Horn, Clark's Fork, Boulder, and Shields rivers would also be controlled.

Other initiatives designed to lock up the water further reflect the current struggle over who will manage private and public lands. The loser invariably seems to be the environment. Consider the impact in the Pacific Northwest of "Interim Strategies for Managing Anadromous Fish-Producing Watersheds on Federal Lands in Eastern Oregon, et al.," also known as "PACFISH."⁵⁴ The government's purpose here is to protect the "present or potential" habitat of salmon, steelhead, and sea-run cutthroat trout. The affected area covers approximately 15 million acres in Washington, Oregon, California, and Idaho.⁵⁵ The fish are anadromous and are variously listed as threatened, endangered, or within critical habitat. The management alternative preferred by the Bureau of Land Management and the Forest Service would significantly reduce or eliminate

⁵³Water Rights Under the Wilderness Act, 59 Fed. Reg. 19,692 (1994).

⁵⁴59 Fed. Reg. 14,356 (1994).

⁵⁵U.S. Dep't of Agriculture, Forest Service & U.S. Dep't of Interior Bureau of Land Management, Environmental Assessment for the Implementation of Interim Strategies for Managing Anadromous Fish-Producing Watersheds in Eastern Oregon and Washington, Idaho, and Portions of California, Introductory Letter of Jack Ward Thomas, Chief, USDA Forest Service, and Mike Dombeck, Acting Director, USDI Bureau of Land Management 1 (Mar. 1994).

grazing for eighteen months within 300 feet on either side of fish-bearing streams; within 150 feet of permanent non-fish-bearing streams, ponds, reservoirs, and wetlands greater than one acre in size; and within 100 feet of intermittent (i.e., seasonally *dry*!) streams and wetlands less than an acre in key watersheds. This is projected to eliminate 42,100 animal unit months of grazing.⁵⁶ The result will be the sale of historic ranches and severe disruption of families and local economies.

But at least this is an environmentally friendly idea, right? Only superficially. As noted earlier in this chapter, rangelands have adapted to eons of grazing by ungulates. Removal of cattle and sheep from this range will have a predictable consequence. Grazing acts as a stimulant for plant growth, much as pruning a backyard bush results in vigorous regeneration. Without grazing, the symbiosis is disrupted, and grasses become stale and decadent. In turn, wildlife will migrate off the federal lands to private rangelands where grasses are more palatable. Range science is replete with examples of rare species that are assisted by ungulate grazing. For example, the mountain plover nests only in relatively heavily grazed areas. This bird evolved with bison under conditions that can now be replicated only with cattle.⁵⁷ Other consequences include loss of man-made riparian areas and increased fire danger as fine fuels accumulate. Finally, cooperative efforts and voluntary actions by individuals will immediately come to a halt.⁵⁸

Another predictable consequence of removal of livestock on the federal lands is an increased pressure to sell ranch holdings to developers. For ranchers who do not sell, grazing pressure on private range and private riparian areas along known anadromous-fish habitat will increase. Thus, actual impact on the fisheries is likely to be greater as a result of removal of livestock from federal lands. This is considered, incidentally, a very likely consequence of judicially mandated injunctions prohibiting livestock grazing in national forests in Oregon and Washington on the basis of agency noncompliance with the Endangered Species Act.⁵⁹

Ranchers and responsible environmentalists alike know that riparian areas are important elements of functional natural systems. Protection or restoration of riparian areas can be accomplished, "usually with a net gain in livestock forage."⁶⁰ Stockmen and land

⁵⁶*Id.* at 64. See *supra* note 42.

⁵⁷Neil E. West, *Biodiversity of Rangelands*, 8 J. RANGE MGMT. 1, 2-13 (1993).

⁵⁸Letter from Rudolph A. Rosen, Director, Oregon Dep't of Fish and Wildlife, to John Lowe, Regional Forester, U.S. Forest Service (Aug. 11, 1994).

⁵⁹*Id.* See also *Pacific Rivers Council v. Thomas*, No. 93-36162 (9th Cir. July 29, 1994) (order).

⁶⁰ED CHANEY ET AL., *LIVESTOCK GRAZING ON WESTERN RIPARIAN AREAS* 32 (1990) (a report reviewed by the Environmental Protection Agency and approved for publication).

managers have long demonstrated the ability to surmount technological barriers to restoring and protecting western riparian areas and associated uplands.⁶¹ Proven examples of advancements in riparian range science include enhanced rotational grazing, improved upland water developments, drift fencing, and changed herding and salting practices. These, combined with in-stream improvements, can bring about numerous riparian benefits simultaneously with heavy recreational and grazing use.⁶²

Ranchers have also learned the painful lesson that providing good stewardship of the resource is no longer sufficient. They must publicize their practices in order to counteract massive misinformation campaigns mounted by professional environmentalists. Few ranchers have either the time or inclination to boast of practices that are considered little more than common sense. Still, the effort is being made, often by their trade associations, to cast the industry in the "greenest" possible light.⁶³

Wolves at the Door

As untenable as "Rangeland Reform '94" is, another Clinton administration proposal is arguably worse. Suppose that the federal government decided that wolves should live in parts of America where they had not existed for over sixty years. A plan must be devised. The feds, believing they enjoy widespread popular support for reintroduction, are emboldened to rely on the time-tested "command and control" method (i.e., outright, topdown coercion) to get the job done. This is not just another wolf story but a waking nightmare for those ranchers who operate on public and private land within the 46,000 square miles affected by the program. The program name is "The Reintroduction of Gray Wolves to Yellowstone National Park and Central Idaho"—although "reintroduction" is a misnomer since the wolves being imported are a distinctly different subspecies from the now extinct wolves that populated Yellowstone at the turn of the century.

We will leave for another day the nagging questions of why the government should spend \$6 million to accelerate wolf recovery in an area prone to natural recolonization and when thousands of gray wolves thrive in other parts of the United States and tens of

⁶¹*Id.* at 40.

⁶²LEW MARTINDALE & JIM WICKEL, *SUCCESSSES IN RANGE MANAGEMENT* 14 (U.S. Forest Service ed., 1988). See also Robert Fowler, *Grazing Management Heads Colorado Range in Right Direction*, 12 *RANGELANDS* 312 (1990).

⁶³An example is the Environmental Stewardship Award Program of the National Cattle-men's Association, discussed above at pp. 197-98.

thousands inhabit western Canada.⁶⁴ Instead we will address the even more difficult question of whether the reintroduction will succeed under this regulatory control scheme.

The wolf reintroduction plan is seriously flawed because it threatens and endangers the business interests of local ranchers. Officials admit that wolves will destroy business assets of local ranchers (namely, calves, lambs, and other livestock).⁶⁵ The plan does not, however, propose to compensate these small businesses for their losses. Instead it will simply hope that supporters of reintroduction in the private sector provide compensation, or else leave the ranchers to bear the loss.⁶⁶

If, then, there is no meaningful method of compensation, one might think there would be a meaningful method of preventing the loss in the first instance. This is not the case. First, these very intelligent predators defy most attempts at human management. Second, ranchers can only "harass" wolves in an "opportunistic noninjurious manner" on those rare instances when they see wolves on their private land or on their public land allotments. On those very rare occasions when the rancher actually witnesses a wolf killing livestock, he or she may kill the wolf if it is on private property. If the wolf kills livestock on public land and if the rancher witnesses the attack (which is extremely rare in these highly remote regions), then the rancher could kill that wolf—but only on the further conditions that: (1) six or more wolf packs have been established in an experimental area, (2) federal or state efforts have failed to control the problem wolf, (3) physical evidence of the predation has been submitted to government investigators, and (4) any such killing of the wolf is reported to the authorities within twenty-four hours.⁶⁷

This bureaucratic and woefully insufficient method of assisting the rancher in the protection of his assets will have predictable results. It will likely prompt some ranchers to adopt an alternative known colloquially as "shoot, shovel, and shut up." As the burdens and costs of compliance rise, this method of dealing with the problem will become increasingly widespread. The government

⁶⁴Endangered and Threatened Wildlife and Plants; Proposed Establishment of a Nonessential Experimental Population of Gray Wolf in Yellowstone National Park in Wyoming, Idaho, and Montana, 59 Fed. Reg. 42,108, 42,110 (1994).

⁶⁵Notice of Availability: Records of Decision and Statement of Findings for the Environmental Impact Statement on Reintroduction of Gray Wolves to Yellowstone National Park and Central Idaho, 59 Fed. Reg. 40,921 (1994); Fish & Wildlife Serv., U.S. Dep't of the Interior, Final Environmental Impact Statement, The Reintroduction of Gray Wolves to Yellowstone National Park and Central Idaho 2-13 (1994) [hereinafter Final EIS].

⁶⁶Final EIS, *supra* note 65, at 2-14, 15. See also Endangered and Threatened Wildlife and Plants, *supra* note 64, at 42,113.

⁶⁷Final EIS, *supra* note 65, at 2-14, 15.

could have devised a program that worked *with* affected ranchers and provided incentives to assist with the recovery plan. Instead, it chose “command and control,” with the resulting disincentives that could undermine the entire effort.⁶⁸

Congress: More “Command and Control”

The executive branch is not alone in its self-defeating approach to environmental regulation. Congress has increasingly sought to impose statutory regimes that contradict both free-market principles and common sense. A good analogy is the ill-fated luxury tax on yachts. The goal of taxing the rich failed miserably and was repealed because the rich stopped buying new yachts. Those hurt by the law were not the rich but the blue-collar workers building the ships. As orders fell off, pink slips were handed out. Eventually Congress recognized the error and reversed it.

Similarly, environmental regulation too often adopts an approach that, by intending to coerce ranchers, has the unintended consequence of hurting the environment. Congress has increasingly departed from the wisdom that is a hallmark of virtually every successful range law—wisdom that recognizes the importance of stewardship provided by ranchers on public lands.⁶⁹ Several examples of this departure are covered in other chapters of this monograph, which deal with the Endangered Species Act, wetlands regulation, and other regulatory excesses. Two additional, very recent examples will therefore suffice here.

During the debate between the industry and the administration over the merits (or demerits) of Rangeland Reform '94, the Senate took up the issue. It began when Senators Domenici (R-N.M.) and Reid (D-Nev.) called for a one-year moratorium on administration regulatory efforts to impose range reforms and increase grazing

⁶⁸Big-game hunters raised numerous concerns about the impact of wolf predation on game animals. Because hunters are afield with weapon in hand, wolves face a very real threat from the government's unresponsiveness to hunters' concerns.

[Despite strenuous objections by many westerners, the Clinton administration has proceeded with its wolf reintroduction plan. Two weeks after the first release, a “wolf that authorities said had apparently been feeding on a newborn calf was found shot to death in a setback for [the] government plan” *Relocated Wolf Is Found Shot*, WASH. POST, Jan. 31, 1995, at A3.—Editor's Note.]

⁶⁹See Taylor Grazing Act, 43 U.S.C. §§ 315 et seq. (passed in 1934); Multiple Use and Classification Act, 43 U.S.C. §§ 1411–1418 (passed in 1964); Federal Land Policy and Management Act, 43 U.S.C. §§ 1751–1784 (passed in 1976; § 1701(m) recognizes grazing as one of the primary uses of federal land); Multiple Use—Sustained Yield Act, 16 U.S.C. § 528 (passed in 1960); National Forest Management Act, 16 U.S.C. § 1604(h) (passed in 1976); Bankhead-Jones Farm Tenant Act, 7 U.S.C. §§ 1000–1012 (passed in 1937, and designed to stabilize farms and ranches and creating the National Grasslands); Public Rangelands Improvement Act, 43 U.S.C. § 1905 (passed in 1978).

fees. The Senate adopted the moratorium by a vote of 59 to 40 as part of the Interior Department appropriations bill.⁷⁰

The House then instructed its representatives on the conference committee to reject the moratorium and impose the administration's changes as an amendment to the bill—that is, actually codify them. This strategy succeeded and was reported to each chamber for final passage. By this point, Senator Reid had changed sides and was leading the codification effort in the Senate, while Senator Domenici continued to fight the reform proposals in any form. Senator Domenici mounted a filibuster—extraordinary in this context—which withstood no less than three votes to cut off the debate. Just prior to the fourth vote to “invoke cloture,” the administration prevailed upon Senator Reid and his followers to relent. The result was passage of an Interior appropriations bill that was free of both the moratorium and the codification.

This remarkable filibuster occurred because of the draconian nature of the amendment inserted by the conference committee. As is often the case, a particular issue came to epitomize the position of the sponsors. For the opponents, led by Senator Domenici, that issue was water rights. The amendment produced by the conference committee⁷¹ brought howls of protest from many influential quarters, most notably the Senators who were able to sustain the filibuster. They were joined by House members and western governors from both parties. The parade of horrors they saw included imposition of a national riparian water law, jeopardizing the economy of the western states, massive litigation to protect existing rights, obstruction of interstate water compacts, and frustration of existing statutes.⁷² When the filibuster held, Interior Secretary Babbitt and his confreres in Congress retreated to the relative safety of the rulemaking process to achieve their ends.

The second notable recent example of legislative hubris is the California Desert Protection Act.⁷³ This bit of congressional handiwork sets aside 7.5 million acres of desert lands in southeastern California as wilderness, 5.5 million acres including national park preserves⁷⁴ (the latter to be administered by the National Park

⁷⁰139 CONG. REC. S11,655 (daily ed. Sept. 14, 1993).

⁷¹*Id.* at S14,182 (daily ed. Oct. 21, 1993). This provision was narrowed somewhat in the draft regulations published by the Interior Department, but the controversy continued unabated. *See supra* pp. 202–06.

⁷²Letter from Gregory J. Hobbs, Jr., et al., to Sens. Hank Brown & Ben Nighthorse Campbell (Oct. 24, 1993).

⁷³S. 21, 103d Cong., 1st Sess. (1993). S. 21 was passed by Congress on the last day of the 103rd Congress. Pub. L. No. 103-433, 108 Stat. 4471 (1994). *See* 140 CONG. REC. H11,131 (daily ed. Oct. 6, 1994), S14,970 (daily ed. Oct. 8, 1994).

⁷⁴140 CONG. REC. S14,964 (daily ed. Oct. 8, 1994). This is an area larger than Connecticut, Rhode Island, and Delaware combined.

Service), in order to preserve natural landscapes and perpetuate "ecosystems."⁷⁵

Grazing of livestock in these areas is a century-old activity. Water development in the desert environment has been crucial to both domestic stock and wildlife, including deer, bighorn sheep, and many riparian dependent species. Maintenance of watering sites in the desert is expensive and time-consuming.⁷⁶ As long as cattle and sheep graze in the desert, the water benefits both livestock and wildlife. If the livestock are forced off the land, the water will evaporate behind them. The Bureau of Land Management, in a 1990 report on grazing land conditions in the California desert, classified 99.5% of the land in fair condition or better.⁷⁷

Yet the California Desert Protection Act, as passed, puts livestock grazing under the authority of the Wilderness Act and the National Park Service, respectively, depending on location.⁷⁸ Because of the Park Service's lack of qualifications and experience for administering livestock grazing, over \$5 million in investments on direct range improvements and the viability of the livestock industry in these vast expanses is at substantial risk.⁷⁹

III. Conclusion

The federal government continues to grow at an alarming pace. Presidents are fond of pronouncing plans to curb that growth and lighten the burden on voters. Often those pronouncements succeed only in exacerbating the problem. A truly endangered species is that law or regulation which sunsets by its own terms. Neither the U.S. Code nor the Code of Federal Regulations shows any sign of contraction. Unfortunately, the costs of compliance, in time and money, are growing in direct proportion with the codes. It is increasingly difficult for small businesses—including sheep and cattle ranchers—to stay in business.

At the same time, the government relies on the tax revenue generated by farmers and ranchers to help fund the plethora of environmental laws and regulations and on agricultural exports to balance trade with other nations. For ranchers on public land,

⁷⁵S. 21, *supra* note 73, at § 2, reprinted in H.R. CONF. REP. NO. 832, 103d Cong., 2d Sess. (1994).

⁷⁶Letter from Daniel K. Macon, California Cattlemen's Association, to Rep. Richard Lehman (May 16, 1994).

⁷⁷Report by California Cattlemen's Association on S. 21 (1993) (on file with author).

⁷⁸S. 21, *supra* note 73, at §§ 103, 306.

⁷⁹Macon letter, *supra* note 76. A discussion of the enormous negative impact of S. 21 on the local economy and the National Park Service as a whole would be possible—but is beyond the scope of this chapter.

these costs are calculated as "nonfee" costs that directly affect the profit and loss statements. In the West, these nonfee costs total over \$800 million annually.⁸⁰

And what do these costs have to do with protecting the environment? Thoughtful individuals in the environmental community and in government know the record of stewardship provided by the ranching community. They know, for instance, that the typical ranch in the fourteen western states supports 158 deer, 60 elk, 108 antelope, 15 wild horses and burros, and a host of less charismatic species.⁸¹ They also know that ranchers provide the ultimate greenbelt of undeveloped land which, if sold, will go toward development of much less environmentally friendly uses such as subdivisions, resorts, and other commercial development. This trend is apparent on the outskirts of any of the West's burgeoning urban centers. Witness the former rangelands whose Spanish name—Las Vegas—means "The Meadows."

The increase in laws and regulations, whether designed to help the environment or not, is directly responsible for the loss of open rangeland as ranchers sell out or are forced out. It is an insidious development but no less real in its impact. One is reminded of James Madison's observation: "I believe there are more instances of the abridgment of the freedom of the people by gradual and silent encroachments of those in power than by violent and sudden usurpation."⁸²

There are three basic choices. The government can work with ranchers to provide incentives for the benefit of the environment. The government can replace ranchers with government employees. Or the government can prohibit ranching. Only the first choice will truly enhance the environment. It is very unlikely that federal employees will do what hundreds of thousands of federal-land ranchers, their families, and their associated personnel have done for over a century in the way of range improvements, even assuming (incorrectly) the expertise were available. And the "return to nature" alternative is based on idyllic and misplaced desires to create a Garden of Eden that has not existed on this continent in recorded history. So the best solution is for government to abandon its adversarial posture, assume a secondary role, and work in concert with private industry at the local level to promote environmentally sound practices that simultaneously are sound business practices.

⁸⁰FOWLER ET AL., *supra* note 15, at Table A.

⁸¹*Id.* at 9.

⁸²Speech in the Virginia Convention (June 16, 1788), in 5 THE WRITINGS OF JAMES MADISON 126 (Gaillard Hunt ed., 1904).

Educate as science evolves, and ferret out bad actors who choose to abuse the resource.

Most importantly, Congress and the executive branch should resist the ever-present temptation to command and control. This is not easily done. Members of Congress and political and career employees of the agencies respond to incentives just as anyone else. Turf protection, increased power, and bigger budgets provide strong incentives. Command and control obtain. When this is combined with national advocacy groups whose mission is to rail against the chosen enemy so dues can be raised and magazines can be sold, it is a wonder that individual operators have withstood the onslaught as well as they have. Increasingly, however, people outside the beltway are crying, "Enough!" This struggle is unlikely to abate any time soon. In the meantime, ranchers will quietly continue to work hand in glove with nature to produce food and fiber for clothing—for the nation and beyond.