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Impoundment and Sale of Cattle Trespassing on Federal Public Lands

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Summary

Several instances have occurred recently in several states where Bureau of Land Management (BLM) personnel have impounded and sold cattle belonging to a federal grazing permittee or other owner when the cattle were grazing on federal lands without authorization to do so – which is to say, when the cattle were trespassing on the federal lands. The impoundment and sale of cattle from the public lands may become the subject of congressional interest and oversight.

The Federal Land Policy Management Act of 1976 for the first time provided general authority for designated BLM personnel to undertake law enforcement activities, but at the same time the agency was to achieve maximum feasible reliance on state and local law enforcement officials for enforcement of federal laws and regulations on the federal lands. In addition, the agency was to cooperate with state and local officials in enforcing state and local law on the BLM-managed lands. Regulations authorize the impoundment of offending cattle by an "authorized officer," which term is defined as any person authorized by the Secretary to administer grazing regulations. This authority may reflect the statutory duty to prevent undue degradation of the lands and the duty of a landowner to minimize harm from trespasses. Following impoundment, cattle may be disposed of, either by the local officials if a suitable agreement is in effect and they have taken the enforcement action, or by the authorized officer if no suitable agreement is in effect or the BLM manager chooses to act. The terms of disposal, sale and redemption rights are governed in part by the federal regulations, and in part by state law to the extent federal law and regulations are silent on an issue or local officials are carrying out those actions. Additional guidance is provided in the BLM Grazing Handbook.

This report explores the authority of BLM personnel regarding unauthorized cattle by reviewing the statutory authorities of BLM over the federal rangelands under its administration, and the regulations and administrative materials implementing those authorities in the context of grazing, trespass, impoundment and sale of unauthorized livestock. The report will be updated as circumstances warrant.

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Introduction

Several instances have occurred recently in several states where Bureau of Land Management (BLM) personnel have impounded and sold cattle belonging to a federal grazing permittee or other owner when the cattle were grazing on federal lands without authorization to do so – which is to say, when the cattle are trespassing on the federal lands. Impoundment and sale of cattle from the federal public lands may become the subject of congressional oversight. This report explores the authority of BLM personnel regarding unauthorized cattle by reviewing the statutory authorities of BLM over the federal rangelands it manages, and the regulations and administrative materials implementing those authorities in the context of grazing, trespass, impoundment and sale of unauthorized livestock.

Background

The BLM manages grazing on many of the public lands in the West, principally under the Taylor Grazing Act (TGA),[1] the Federal Land Policy and Management Act (FLPMA),[2] and the Public Rangelands Improvement Act (PRIA).[3] These statutes provide considerable specific direction for the grazing program and also set out duties and authorities to regulate and protect the public lands. The TGA and FLPMA also set out penalties for violation of regulations, and FLPMA expressly addresses enforcement activities by BLM personnel. In addition to these express provisions, other laws and legal principles may pertain. This report will first examine the federal statutes and regulations on these matters and then address how the federal provisions and regulations might relate to state laws and procedures on these same topics, both in general and as to impoundment and sale of livestock by BLM personnel.

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[1]Act of June 28, 1934, ch. 865, 48 Stat. 1270, 43 U.S.C. §§ 315 *et seq*.

[2]Act of October 21, 1976, Pub. L. No. 94-579, 90 Stat. 2744, 43 U.S.C. §§ 1701 *et seq*.

[3]Act of October 25, 1978, Pub. L. No. 95-514, 92 Stat. 1803, 43 U.S.C. §§ 1901 *et seq*.

Federal Laws and Regulations

As noted, the TGA, FLPMA and PRIA contain language directing the protection of the federal lands. The TGA directs the Secretary of the Interior to regulate the occupancy and use of the lands "to preserve the land and its resources from destruction or unnecessary injury, to provide for the orderly use, improvement, and development of the range ...."

FLPMA directs that the public lands be managed to "take any action necessary to prevent unnecessary or undue degradation of the lands,"[4] and the Secretary is directed to issue regulations necessary to implement the provisions of the Act with respect to the management, use, and protection of the public lands. PRIA directs that the goal of management shall be "to improve the range conditions as feasible in accordance with the rangeland management objectives established through the land use planning process, and consistent with the values and objectives listed in sections 1901(a) and (b)(2) of this title." These referenced provisions in turn address rangeland conditions, and direct management to, among other things, "maintain and improve the condition of the public rangelands so that they become as productive as feasible for all rangeland values ...," and "prevent economic disruption and harm to the western livestock industry" by charging fees for grazing. Language also is contained in the TGA that requires that grazing privileges be adequately safeguarded.[5]

FLPMA further states that "[t]he use, occupancy or development of any portion of the public lands contrary to any regulation of the Secretary or other responsible authority, or contrary to any order issued pursuant to any such regulation, is unlawful and prohibited."[6] FLPMA also provides that any person "who knowingly and willfully violates any such regulation which is lawfully issued pursuant to this Act shall be fined no more than $1,000 or imprisoned no more than twelve months, or both."[7] The TGA provides a fine of $500 for willful violation of that law or regulations after actual notice thereof.[8]

In response to these statutory directions to protect and regulate the use of the federal lands, BLM grazing regulations address range conditions and regulate livestock numbers and use of the rangelands. As will be discussed, regulations specifically authorize the impoundment and sale of livestock that is grazing either without a permit or in violation of a permit. Regulations authorizing some form of

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[4] 43 U.S.C. § 1732(b).

[5] 43 U.S.C. § 315b

[6] 43 U.S.C. § 1733(g).

[7] 43 U.S.C. § 1733(a).

[8] 43 U.S.C. § 315a.

impoundment have been on the books since at least the 1950's.[9] Regulations were adopted in modern form in 1978[10] and have changed little since that time.

The regulations currently distinguish among infractions that are nonwillful, willful, or repeated willful. Violators are "liable in damages to the United States for the forage consumed by their livestock, for injury to Federal property caused by their unauthorized grazing use, and for expenses incurred in impoundment and disposal of their livestock, and may be subject to civil penalties or criminal sanction for such unlawful acts."[11] The BLM must provide written notice of allegedly unauthorized livestock grazing to the owner, if known, along with the order to remove the unauthorized livestock.[12]

When a violation has been determined to be nonwillful and incidental (presumably by the authorized officer), the authorized officer has discretion as to how to correct the violation, assess damages, and otherwise settle the claim.[13] "Authorized officer" is defined as "any person authorized by the Secretary to administer the grazing regulations.[14] Penalties become more severe, depending on the character of the violation. Monetary damages for unauthorized use can range from none at all in some circumstances, to double the value of forage consumed for willful violations, and triple the value of forage consumed for repeated willful violations.[15] Grazing permits can be suspended or cancelled if damages are not paid.[16] In addition to suspension or cancellation for non-payment of damages, the authorized officer may suspend or cancel a grazing permit or lease in whole or in part – and in some cases must do so – for certain other violations. When the infraction is committed by a nonpermittee, the infraction is to be referred to the "proper authorities" for appropriate legal action by the United States against the violator,[17] and TGA and FLPMA penalties may be assessed.[18] There is no elaboration on who the proper authorities are.

Livestock can be impounded if either the owner is unknown or the permittee fails to remove the livestock when ordered to do so.[19] A separate notice of intent to impound must be sent by certified mail or personally delivered to the owner or his agent, or both, or be posted if the owner is unknown. Impoundment may occur any

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[9]*See*, Hatahley v. United States, 351 U.S. 173 (1956).

[10]43 Fed. Reg. 29,058 (July 5, 1978).

[11]43 C.F.R. § 4150.1.

[12]43 C.F.R. § 4150.2.

[13]43 C.F.R. § 4150.2(b).

[14]43 C.F.R. § 4100.0-5.

[15]43 C.F.R. § 4150.3.

[16]43 C.F.R. §§ 4150.3(e) and 4160-1.

[17]43 C.F.R. § 4170.1-1(c).

[18]43 C.F.R. §§ 4170.2-1 and 4170.2-2.

[19]43 C.F.R. §§ 4150.2(c) and 4150.4.

time after 5 days from delivery of the notice up to 12 months from the effective date of notice.[20] Following impoundment, the owner has a chance to redeem the livestock, and if they are not redeemed, they may be sold.[21]

The impoundment and sale regulations touch on the relationship of possible actions by federal personnel to possible actions by non-federal personnel authorized under state and local law. Impounded livestock "may" be turned over to the State for disposal if a "suitable agreement" is in effect.[22] Similarly, livestock may be redeemed or sold in accordance with state law if a suitable agreement is in effect prior to the time of sale.[23] However, the regulations allow the federal land managers to impound cattle and to sell or dispose of trespassing cattle if no suitable agreement exists for state and local authorities to do those tasks:

> **§ 4150.4 Impoundment and disposal.**
>
> Unauthorized livestock remaining on the public lands or other lands under Bureau of Land Management control, or both, after the date set forth in the notice and order to remove sent under § 4150.2 may be impounded and disposed of *by the authorized officer* as provided herein. (Emphasis added.)
>
> **§ 4150.4-2. Impoundment.**
>
> After 5 days from delivery of the notice under § 4150.4-1(a) of this title or any time after 5 days from publishing and posting the notice under § 4150.4-1(b) of this title, unauthorized livestock may be impounded without further notice any time within the 12-month period following the effective date of the notice.
>
> **§ 4150.4-3 Notice of public sale.**
>
> Following the impoundment of livestock under this subpart the livestock may be disposed of *by the authorized officer* under these regulations *or*, if a suitable agreement is in effect, they *may* be turned over to the *State* for disposal .... (Emphasis added.)

To analyze the relationship of the federal statutory and regulatory provisions to state and local law, some general background on the legal status of the federal lands and on principles of trespass is necessary.

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[20]43 C.F.R. §§ 4150.4-1 and 4150.4-2.

[21]43 C.F.R. §§ 4150.4-4 and 4150.4-5.

[22]43 C.F.R. § 4150.4-3. The suitable agreement may be the contracts with local officials as representatives of the relevant state under 43 U.S.C. § 1733. The authority to turn a matter over to state authorities if a suitable agreement exists appears to be discretionary. We do not address possible situations where the federal managers may believe that circumstances warrant the federal personnel taking action even if a suitable agreement exists.

[23]43 C.F.R. §§ 41504-4 and 41504-5.

Federal Jurisdiction over Land

The federal government may have one of several types of jurisdiction over lands and the scope and applicability of state law varies depending on the type of federal jurisdiction. The federal government has "exclusive legislative" jurisdiction over the District of Columbia and federal enclaves regarding which the relevant state has consented to such jurisdiction under Art. 1, § 8, Cl. 17. State law does not apply to these lands at all, except to the extent the federal government has directed that it may. Over other areas, the federal government may have partial exclusive legislative jurisdiction – exclusive federal jurisdiction to which a state has consented, but only for some particular purposes, rather than in general. The federal government may have concurrent legislative jurisdiction over other lands, again with state consent, in which case both the state and federal governments have general legislative jurisdiction and state law applies unless federal law preempts it. Over still other areas, the federal government has mere proprietary jurisdiction and state law applies fully unless and until federal law preempts it. The consent of a state is not necessary for the federal government to own land under Art. IV of the Constitution, or to enact preemptive federal legislation pursuant to one of its constitutional powers. The type of jurisdiction is indicative of the extent to which state law applies and the extent to which federal preemption is necessary to give federal actions primacy.

Federal law can preempt state and local law, either expressly or by implication.

> State law can be pre-empted in either of two general ways. If Congress evidences an intent to occupy a given field, any state law falling within that field is preempted .... If Congress has not entirely displaced state regulation over the matter in question, state law is still pre-empted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, ... or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.[24]

Typically, the federal government has only proprietary jurisdiction over the public lands managed by BLM.[25] Therefore, state law applies fully, except as Congress has otherwise provided. As reviewed above, Congress has legislated on the protection of the federal lands and grazing on them, and regulations have been promulgated to implement those laws. But issues remain as to how those federal authorities relate to state law.

Remedies Available for Trespass on Federal Lands

The federal government has two statuses with respect to its BLM lands within a state. On the one hand, the federal government is a property owner under state law

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[24]California Coastal Commission v. Granite Rock Company, 480 U.S. 572, 581 (1987), citations omitted.

[25]JURISDICTION OVER FEDERAL AREAS WITHIN THE STATES: Report of the Interdepartmental Committee for the Study of Jurisdiction over Federal Areas within the States, June, 1957.

and enjoys the same opportunities to protect its lands as does any other landowner in that state. On the other hand, the federal government can and has preempted state law with federal law as to those lands in some respects. How these two roles relate may not always be clear.

There are several criminal penalties for trespass on the federal lands,[26] including penalties for trespass grazing resulting from driving or knowingly permitting livestock to enter any inclosure on the lands of the United States.[27] As discussed above, federal criminal penalties are available under FLPMA and TGA for violation of regulations, and civil remedies also are set out in federal law and regulations. In addition, the federal managers may have other avenues of redress available. Trespass is a "tort," a wrong done to the possessory interest of a landowner through the unauthorized use of the owner's land. A landowner has the right to end a trespass and collect damages from a trespasser for any unauthorized use. But, under what is known as the "rule of avoidable consequences," a landowner also has the duty to minimize damages by taking reasonable measures to halt or abate the harm, or risk forfeiting the part of the damages that could have been avoided.[28] In other words, an owner cannot sit back, do nothing, let damages accrue, and then claim full damages. In the context of a trespass by cattle, taking reasonable action arguably may consist of rounding up the offending cattle, impounding them, and notifying the owner.

Exactly what remedies might be available under state law can vary. Under the laws of many western states, "trespass" by cattle is complicated by a landowner's duty – or lack thereof – to fence land; either to fence his own cattle in or fence the cattle of others out. In some states, a landowner has a duty to fence his livestock in or be liable for their actions. Other states are "fence out" states in which cattle may roam at large without liability, except in areas where an owner has fenced an area to keep animals other than his own out.

Assuming a trespass can be shown, states vary as to when and how damages for forage consumed by errant cattle may be collected. Regardless of fencing issues, in many western states, a person is entitled to a lien against animals that a person fed, for the value of the forage and feed.[29] The owner of the livestock is liable to pay the amount owed, or the livestock may be sold. Typically, these statutes apply to situations where an owner arranged for another person (the "agistor") to pasture or feed cattle, but then failed to claim the animals or to pay for their care. (But it could be asked whether a person who involuntarily fed trespassing cattle should have fewer rights to recover the value of forage or feed than a person has who did so voluntarily.) Typically too, many states have statutes governing stray (usually defined as unbranded) livestock that allow for their impoundment and sale.[30] Jurisdictions vary

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[26]18 U.S.C. §§ 1851, 1852, 1853, and 1863.

[27]18 U.S.C. § 1857.

[28]1 DAMAGES IN TORT ACTIONS, § 3.07[4] (2000); PROSSER AND KEETON ON TORTS 458 (5th Ed. 1984)

[29]*See e.g.*, Ut. Code Ann. 38-2-1 (1953, 2000 Supp.); Wy. Stat. Ann. 29-7-101 (1999).

[30]Ut. Code Ann. 4-25-1 (1953, 2000 Supp.).

as to the range of formalities required to impound and sell livestock; some have informal procedures that allow a rancher to impound and sell the cattle; others require local law enforcement personnel to carry out the procedures.

As noted, the current federal grazing regulations authorize the federal range managers to impound and sell livestock in accordance with the federal regulations, or to let state and local authorities dispose of livestock when a suitable agreement on such matters is in effect. As discussed, the pre-FLPMA regulations did not appear to authorize BLM personnel to take such actions themselves, while the post-FLPMA regulations do. The explanatory material accompanying the post-FLPMA 1978 and 1982 regulations show that public comments raised this point of why the regulations did not require compliance with state law, but the issue was not fully discussed. The issue is not why total reliance was not put on state law – this was never the pre-FLPMA position – but rather why and to what extent FLPMA gave BLM personnel the authority to carry out actions such as the impoundment and sale of unauthorized animals themselves. To examine that question further, the law enforcement provisions of FLPMA will be reviewed.

FLPMA Provisions on Law Enforcement

Section 303 of FLPMA (43 U.S.C. § 1733) provides that the Secretary may authorize federal personnel or appropriate local officials to carry out his law enforcement responsibilities with respect to the public lands and their resources. The Secretary has several options to enforce *federal* laws and regulations. When the Secretary determines that assistance is necessary, the Secretary may offer to contract with appropriate local law enforcement officials to achieve "maximum feasible reliance" upon local law enforcement officials in enforcing federal laws and regulations. The Secretary also may designate federal personnel to carry out law enforcement responsibilities with respect to the public lands and their resources, and may request the Attorney General to institute a civil action for an injunction or other order to prevent any person from utilizing public lands in violation of regulations.

The Secretary is also authorized to cooperate with the regulatory and law enforcement officials of any state or political subdivision of a state in the enforcement of *state and local* laws or ordinances.

The enacted language on law enforcement differs from the introduced language in several respects. Both the House and Senate bills addressed the issue.

The Senate bill, S. 507, had many of the elements that ultimately were enacted. Section 307 authorized the Secretary to request that the Attorney General institute a civil action for an injunction or other appropriate order to prevent a person from using the federal lands in violation of laws or regulations, and also authorized the Secretary to designate employees to carry firearms, execute warrants and process, and make arrests in certain circumstances. In addition, under § 308, the Secretary could cooperate with local law enforcement officials and provide reimbursement to a state or subdivision for help in the regulation of the use of the federal lands. The committee report discussed the need to provide BLM personnel with law enforcement

authority to stop unlawful acts that were increasing on the lands "and in many situations are 'out of control' or nearly so."[31] The report further noted that BLM's capability to enforce the lawful use of the lands was "almost non-existent."[32]

> While basic law enforcement traditionally is a state problem and most major categories of public and private offenses are adequately covered by state law, such laws do not apply to the enforcement of special rules and regulations on Bureau administered lands It is in this area that the most glaring deficiency exists in both state and Federal laws.
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> ....
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> To date, the Bureau's attempts to solve such problems by using the only tools available to it, persuasion, cooperation, and education, have not been successful. Every evidence indicates that without enforcement authority and authority to cooperate with State and local law enforcement agencies as spelled out in [section 308 of S. 507], the Bureau's situation will continue to deteriorate. Some examples of past problems are shown below.[33]

The report goes on to discuss that in the previous Congress, some Members had expressed concern about providing general law enforcement authority to Departmental personnel who lacked the intensive training and experience of State and local law enforcement personnel. The committee expressed the opinion that "the better alternative is to authorize the Secretary to contract with State and local officials for general law enforcement on the national resource lands. This authority is provided in section 308."[34] Nonetheless, the bill also authorized special BLM enforcement personnel to enforce "all Departmental laws and regulations" on all Department of the Interior lands. The report then describes § 308 as conferring on the Secretary authority to cooperate with state and local law enforcement agencies in "enforcement of *State and local laws* on national resource lands."[35] (Emphasis added.)

Sen. Henry M. Jackson, then Chairman of the Senate Committee on Energy and Natural Resources, noted that "[p]erhaps the most critical finding of the Public Land Law Review Commission [the Commission that had studied all then current laws pertaining to the lands managed by BLM] is the appalling absence of the enforcement authority so necessary for any land management agency. The National Resource

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[31]S. Rep. No. 94-583 at 57 (1975), *reprinted in* LEGISLATIVE HISTORY OF THE FEDERAL LAND POLICY MANAGEMENT ACT OF 1976, prepared for the Committee on Energy and Natural Resources, United States Senate, April, 1978. GPO Publication 95-99, hereafter referred to as "LEG. HIST.," at 122.

[32]*Id.*, at 58, *reprinted in* LEG. HIST., *supra*, at 123.

[33]*Id.*

[34]*Id.*

[35]*Id.*, at 60, *reprinted in* LEG. HIST., *supra*, at 125..

Lands Management Act would provide the BLM with authority similar to that already possessed by the Park Service and the Forest Service."[36]

The House bill, H.R. 13777, contained more detail on enforcement. It included language in § 302(c) that authorized the Secretary, when he determined that assistance was necessary "to enforce any Federal law or regulations" relating to the public lands or their resources, to contract with state and local law enforcement officials for the enforcement of federal law and regulations "with the view of achieving maximum feasible reliance upon such regulatory and law enforcement officials in administering such regulations and laws." The Secretary was to negotiate these contracts annually with such officials, whose authorities to arrest, etc. were set out. The Secretary could reimburse the state or subdivisions and could provide training as he deemed necessary. Under the bill at this stage, if, and only if, such a contract was declined, or the state or locality lacked the authority to enter into one, could the Secretary designate federal personnel to carry out enforcement responsibilities on the public lands.

The committee report reiterates that federal personnel were not authorized to act unless contractual assistance was unavailable. The report pointed out that the boundaries of the public lands are poorly marked or not marked at all, making it difficult for members of the public to know when in fact they were on public lands. In addition, the report continues, the rules and regulations for the public lands are numerous and not too well known. Therefore, the Secretary was authorized to contract for assistance in enforcing federal law and regulations, and to cooperate with State and local enforcement officials, financially and otherwise, to assist in the enforcement of "State and local laws and ordinances where such activities will assist in the administration and regulation of use and occupancy of the public lands. The Committee expects the Secretary of the Interior to construe this authority broadly, for the purpose is to provide financial assistance to States and their subdivisions where the existence of large areas of public lands deprives the governmental entity of adequate enforcement of laws and ordinances as they apply to the public lands."[37] Again, only if state and local enforcement was not available could designated federal personnel act as enforcement officials.

In dissenting views printed as part of the committee report, Rep. John F. Seiberling and others had described the enforcement authority as "unworkable" and the enforcement authority of BLM employees as "totally inadequate."

> Normally, the only remedy available for BLM officials is to make a citizen's arrest, or call the local sheriff, who may be many miles distant and who also may be philosophically unsympathetic to Federal Regulations." ...
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> This bill does nothing to improve that situation. It directs the Secretary to offer "reasonable" contracts to state and local law

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[36]122 CONG. REC. S 2366 (daily ed. February 25, 1976), *reprinted in* LEG. HIST. *supra*, at 212.

[37]H.R. Rep. 94-1163 at 14-15 (1976), *reprinted in* LEG. HIST., *supra*, at 444-445.

> enforcement officials whenever their help is needed to enforce Federal laws and regulations. *Only* if those authorities *refuse* such a contract can the Interior Department exercise enforcement authority. Thus BLM officials would *still* have to call the local sheriff.
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> ... For many years the National Park Service, U.S. Forest Service and Fish and Wildlife Service have had effective enforcement authority on the lands they manage. Curiously, the bill gives the necessary authority for the California Desert but does not do so for the rest of our public lands, where the same kinds of problems exist.[38]

Several Members commented on the floor that the lack of adequate BLM enforcement authority in the reported bill was unwise and would compromise the new management authorities the bill would provide.[39]

Rep. Seiberling offered an amendment that would leave in place the language directing the Secretary to achieve "maximum feasible reliance" on local law enforcement personnel to enforce Federal laws and regulations, but would also provide "backup authority to designate trained Federal personnel to carry out these enforcement responsibilities when needed."[40] Rep. Seiberling stated that allowing the Secretary to enforce only after state and local law enforcement officials refused an annual contract was not adequate, and noted that BLM currently had only seven special agents who were authorized to investigate natural resource violations, but had to call on another federal agency to make arrests, or attempt to persuade state or local officials to make an arrest if a state or local law had also been violated. At times state law was not adequate and federal enforcement personnel also might not be available:

> ... But many States do not have specific laws protecting the diverse resources of the public lands, and enforcement of State laws is uneven, because of the variation in laws throughout the West.
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> Although the FBI can sometimes assist, that agency cannot take on an interstate transportation of stolen property case unless it involves property valued at a minimum of $50,000. In cases involving wildlife violations, the Fish and Wildlife Service has authority for migratory birds and endangered species, but its enforcement personnel are severely overburdened and thus not always able to assist BLM.[41]

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[38] *Id.*, at 233, 660.

[39] 122 CONG. REC. H. 7588 (daily ed. July 22, 1976)(remarks of Reps. Forsythe and Downey) *reprinted in* LEG. HIST., *supra* at 674.

[40] 122 CONG. REC. H 7613 (daily ed. July 22, 1976), *reprinted in* LEG. HIST., *supra* at 699.

[41] *Id.*

Rep. Jim Santini spoke against the establishment of what he termed "a Federal police force" within states, both on general principle and because he asserted that the additional duties would be a burden to BLM and the officers might not be adequately trained. "We have had tragic episodes in trying to pervert and convert the botanist into a law enforcement officer when he is confronted with resistance."[42] Rep. Santini defended the reported bill language that conditioned BLM enforcement authority on local enforcement officials being unavailable. Rep. Seiberling again asserted that the current bill language – requiring BLM to negotiate annually with all relevant law enforcement entities – was unworkable, and the amendment giving BLM law enforcement authority prevailed.[43]

The conference report states that both the Senate and House had similar provisions for law enforcement with some marked differences that were acted upon as follows:

> (c) The conferees accepted the policy in the House amendments that the Secretary of the Interior seek maximum feasible reliance in his discretion upon local law enforcement officials in enforcing Federal laws and regulations. The Secretary is expected to keep this goal in mind, as well as his authority to assist local law enforcement officials in enforcing local laws and regulations, as he carries out his primary responsibility of assuring adequate law enforcement for the public land areas.[44]

Discussion

FLPMA directed the BLM to achieve maximum feasible reliance on state and local law enforcement officials for enforcement of *federal* laws and regulations on the federal lands, while at the same time providing that agency with the general authority for designated BLM personnel to undertake law enforcement activities. In addition, the agency was to cooperate with state and local officials in enforcing *state and local* law on the BLM-managed lands.

As discussed, the post-FLPMA regulations authorize the impoundment of offending cattle by the "authorized officer," which term is defined as "any person authorized by the Secretary to administer regulations in this [grazing] part."[45] Possibly these managers are authorized to take these actions because they would not be arresting violators. Possibly too, this authority may reflect the statutory duty to prevent undue degradation of the lands and the duty of a landowner to minimize harm from trespasses. Following impoundment, the cattle may be disposed of, either: 1) by the authorized officer under the federal regulations if no suitable agreement is in

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[42] *Id.*

[43] 122 CONG. REC. H 7614 (daily ed. July 22, 1976), *reprinted in* Leg. Hist., *supra*, at 700.

[44] H.R. Rep. No. 94-1724 at 60 (1976), *reprinted in* LEGIS. HIST., *supra*, at 930.

[45] 43 C.F.R. § 4150.4 and 4100.0-5 respectively.

effect that provides for local law enforcement officials to take such action, or there is such an agreement but the BLM manager chooses to act; or 2) by the local officials if there is a suitable agreement in effect and the authorized officer does not take action.[46] The terms of disposal, sale and redemption rights are governed in part by the federal regulations, and in part by state law to the extent federal law and regulations are silent on an issue, and to the extent a suitable agreement is in effect and the BLM manager chooses to take that alternative.[47]

The federal regulations do not provide a great deal of detail on how impoundment and sales are to be carried out, but additional guidance is available in the BLM Grazing Handbook. Although this material is not binding to the extent regulations are, the guidance does seem to reflect a basic posture of compliance with state and local law that comports with the type of federal jurisdiction and with statutory and regulatory requirements. Many aspects of the holding and transport of livestock are addressed in the Grazing Handbook.[48]

To summarize, federal range managers are authorized under federal regulations to impound trespassing cattle. If a suitable agreement with state and local law enforcement entities is in effect, then allowing the state and local law enforcement personnel to handle the sale and disposal of trespassing cattle is probably the avenue that should be pursued first, unless some circumstances indicate that the federal managers should take action nonetheless. In the absence of a "suitable agreement," or arguably if circumstances warrant, federal officials may act. It appears that range managers are among those authorized by current regulations to act in this circumstance, in addition to specially designated BLM law enforcement personnel. If federal personnel take action, it appears they must comply with federal laws and

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[46]43 C.F.R. § 4150.4-3.

[47]43 C.F.R. § 41504-3 through 4-5.

[48]For example, as to impoundment, the Handbook states at H-4150-1.42A that impoundment may be accomplished by BLM employees or under contract, with supervision by the authorized officer. H-4150-1.42B states: "Holding facilities, if practical, should be located on public lands and owned by the Federal Government. If Federal facilities are not available, a formal lease arrangement may be made to use other facilities. The impounded livestock must be provided adequate care and security to prevent their unauthorized removal. Whenever impounded livestock are to be moved, the authorized officer must coordinate with the State brand inspector before the move is initiated."
During the time stock are held by the federal government, H-4150-1E states that: "The Federal Government accepts responsibility for impounded animals unless the action is taken by local law enforcement officials under State law."

As to sale, H-4150-1.43A states: "Prior to the sale of impounded livestock, close coordination with the State brand inspector is required to ensure that the buyer will be permitted to move the livestock from the sale site. The authorized officer publishes a Notice of Sale in a local newspaper and posts the notice at the county courthouse and at a post office near the land involved ...." Under .43B, "Impounded livestock may be turned over to the State for disposal if the State has estray or similar laws which permit disposal of such livestock, and an agreement exists which allows the BLM to recover damages and costs incurred ...."

regulations or they may be subject to liability.[49] As a general rule, state and local law must also be followed, although there could be circumstances when that might not be feasible.

[49]In Hatahley v. United States, 351 U.S. 173 (1956), the Supreme Court found federal range agents liable under the Federal Tort Claims Act for disposing of Indian horses without giving proper notice. The Court, at 181, found a narrow area of liability in which "a government agent can act beyond his actual authority and yet within the scope of his employment." Under the pre-FLPMA regulations (43 C.F.C. § 161.1 *et seq.*) in effect in 1956, a range manager could either proceed "under local impoundment law and procedure, if practicable; otherwise he may refer the matter through the usual channels for appropriate legal action by the United States against the violator." The Court viewed the notice required by the federal regulations as a condition precedent to taking further action.