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Grazing Regulations and Policies: Changes by the Bureau of Land Management

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Carol Hardy Vincent
Specialist in Natural Resources
Resources, Science, and Industry Division

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Summary

The Bureau of Land Management (BLM) is taking a two-pronged approach to grazing reform, by proposing changes to grazing regulations and considering other changes to grazing policies. With regard to regulations, on December 8, 2003, the BLM proposed changes to existing rules (43 CFR Part 4100). On January 2, 2004, the agency issued a draft environmental impact statement (DEIS) that analyzes the potential impact of the proposed changes, a slightly different alternative, and the status quo. BLM asserts that regulatory changes are needed to increase flexibility for grazing managers and permittees, to improve rangeland management and grazing permit administration, to promote conservation, and to comply with court decisions. The possibility of rules changes, and the particular changes proposed, have been lauded by some but criticized by others. The last major revision of grazing rules, which took effect in 1995 after a lengthy development process, was highly controversial. BLM is currently reexamining many of the changes made at that time.

The current proposal would make many changes. The BLM and a permittee would be able to share title to structural range improvements, such as a fence. Permittees would be able to acquire water rights for grazing, consistent with state law. The occasions on which BLM would be required to get input from the public on grazing decisions would be reduced. The administrative appeals process on grazing decisions would be modified and the extent to which grazing could continue in the face of an appeal or *stay* of a decision would be delineated. The definition of *grazing preference* would be broadened to include a quantitative meaning — forage on public land — measured in Animal Unit Months. Changes would be made to the timeframe and procedures for changing grazing management after a determination that grazing is a significant factor in failing to achieve rangeland health standards. The current 3-year limit on temporary nonuse of a permit would be removed, and permittees would be able to apply for nonuse of a permit for up to one year at a time. Conservation use grazing permits would be eliminated. BLM considered, but did not propose, certain changes due to adverse public reaction or other considerations. For instance, the agency did not propose rule language to support the establishment and operation of a new type of grazing unit, called a *reserve common allotment*.

Public comment on the proposed rule changes and the DEIS will be accepted until March 2, 2004. BLM expects to issue a final grazing rule and environmental impact statement in October 2004, to become effective in December 2004.

BLM also is considering changes to its grazing policies, which the agency believes can be carried out under existing rules. Potential policy changes, to follow the rulemaking process, relate to: the establishment of reserve common allotments to serve as backup forage when permittees' regular allotments are unavailable; conservation partnerships between the BLM and permittee whereby permittees work to improve environmental health in return for certain benefits; voluntary allotment restructuring to allow multiple permittees to merge allotments; and landscape habitat improvement to promote species conservation and facilitate consultations under the Endangered Species Act. This report will be updated as events warrant.

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History

The Bureau of Land Management (BLM) has proposed changes to grazing regulations (43 CFR Part 4100) and is considering related policy changes. The last major revision of grazing regulations culminated in comprehensive changes effective August 21, 1995. The changes were the result of a several-year process of evaluating ideas and shaping alternatives, and occurred in the midst of a decades-long dispute over the ownership, management, and use of federal rangelands.

The 1995 changes were highly controversial, with criticism from many ranching interests that those new rules weakened grazing privileges and would reduce livestock grazing on federal lands, and from environmental organizations that the changes did not go far enough in protecting public lands. Supporters saw the changes as improving resource and range management and broadening participation in public land decisionmaking. Congress has considered many of the 1995 changes, as part of legislative proposals or committee oversight, and may examine the proposed regulatory and policy changes.

Among the changes made in 1995, many of which are being reexamined currently by BLM, are those that:

- separated grazing *preference* from *permitted use*, so that a permittee's[1] preference for receiving a grazing permit was not tied to a specific amount of grazing based on historic levels (described as *Animal Unit Months*, or *AUMs*);
- allowed permittees up to 3 years of nonuse of their permits;
- authorized the suspension or cancellation of a permit if a permittee is convicted of violating certain state or federal environmental laws;
- eliminated the express requirement that a permittee be engaged in the livestock business;
- replaced the term *affected interest* with *interested public*;
- allowed *conservation use* for the term of a grazing permit, thereby excluding livestock grazing from all or a portion of an allotment;
- required title of permanent structural improvements to be held in the name of the United States;
- required that water rights for livestock grazing be held in the name of the United States, to the extent allowed by state law;

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[1]The term permittee is used throughout to refer to both permittees and lessees, and permit refers to both permits and leases.

- imposed a surcharge on a permittee who allows livestock not owned by the permittee or the permittee's children to graze on public land;
- eliminated Grazing Advisory Boards and replaced them with the broader interest Resource Advisory Councils; and
- adopted rangeland management standards called *Fundamentals of Rangeland Health*.

In issuing these changes, the Secretary of the Interior dropped the most contentious proposal — to increase the grazing fee — due to the rancor this issue generated.[2] However, dissatisfaction with the 1995 changes among ranching interests led to a lawsuit ultimately decided by the U.S. Supreme Court.[3] The regulations, challenged on their face, were upheld by the courts as not exceeding the authority of the Secretary, with one exception. The courts struck down the rule pertaining to conservation use for the term of a permit on the grounds that a grazing permit was for grazing and the Secretary could more appropriately accomplish conservation use through the land use planning process.

Current Efforts to Change Grazing Rules and Policies

BLM is taking a two-pronged approach to this iteration of grazing reform on public lands, by proposing changes to grazing regulations and considering changes to grazing policies. Under this *Sustaining Working Landscapes* initiative, first announced in March 2003, BLM seeks to create *working landscapes* that are both economically productive and environmentally healthy. Changes to grazing regulations and policies could affect more than 18,000 grazing permits on 162 million acres of BLM land. The specific regulatory proposals and policy alternatives are discussed under separate headings below.

BLM proposed changes to its grazing regulations (68 *Fed. Reg.* 68451) on December 8, 2003, and on January 2, 2004 issued a draft environmental impact statement (DEIS) analyzing the potential impact of the proposed changes.[4] The DEIS also assesses the impacts of a slightly different alternative and of keeping the current grazing rules. Prior to proposing the changes, BLM reviewed more than 8,000 public comments on regulatory issues that were submitted in response to a March 3, 2003 advanced notice of proposed rulemaking.

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[2]For more information on grazing fees, see CRS Report RS21232, *Grazing Fees: An Overview*, by Carol Hardy Vincent.

[3]For more information on the legal challenge to the 1995 regulations on livestock grazing, see CRS Report RS20453, *Federal Grazing Regulations: Public Lands Council v. Babbitt*, by Pamela Baldwin.

[4]The DEIS is available at:
[https://www.eplanning.blm.gov/us_grazing/builds/build45/index.htm], visited on January 22, 2004.

BLM asserts that regulatory changes are needed to increase flexibility for grazing managers and permittees, to improve rangeland management and permit administration, to promote conservation, and to comply with court decisions. The possibility of regulatory changes was welcomed by some livestock organizations and range professionals as helping both ranchers and the range. By contrast, others have criticized the proposed changes as removing important environmental protections.

With regard to the environmental effects of the proposed alternative, the DEIS states (p. ES-4) that "there may be some short-term adverse effects that cannot be avoided because of extended timeframes resulting from several components of this proposed rulemaking." This statement fueled concerns among environmentalists that the proposed changes could eliminate public land protections and lead to unsustainable grazing practices. The DEIS states that to minimize the potential for adverse affects in the short-term, the BLM could curtail grazing where "imminent likelihood of significant resource damage exists." Further, the BLM asserts that the long-term outcome of the proposed changes would be better and more sustainable grazing decisions, and that such decisions would have long-term positive effects on rangeland health.

In late January and early February of 2004, BLM held public meetings in the west and in Washington, DC to gather public comments on the regulatory proposal and DEIS. The proposal and DEIS are open for public comment through March 2, 2004. Following consideration of public comments, the BLM expects to issue a final grazing rule and environmental impact statement in October 2004, with the final rule taking effect in December 2004.

On March 25, 2003, BLM first announced possible grazing policy changes as a complement to the regulatory changes being considered.[5] According to BLM, the focus is on policy changes that can be carried out under existing rules. The distinction between policies and regulations generally is not always clear, and when an agency must take action through formal rulemaking can be an issue.[6]

The agency seeks policy reforms to promote citizen stewardship of public lands, provide flexibility to managers of livestock grazing, and increase innovative partnerships. Currently, BLM is reviewing the advice and recommendations of its Resource Advisory Councils on policy ideas.[7] Final grazing policy changes will be developed when the rulemaking process is "substantially completed," according to BLM.

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[5] The announcement took the form of a press release, now contained on the BLM website at [http://www.blm.gov/nhp/news/releases/pages/2003/pr030325_grazing.htm], visited on February 20, 2004.

[6] See 5 U.S.C. §551(4).

[7] BLM has two dozen Resource Advisory Councils (RACs) in western states to provide the agency advice on managing public lands. Each RAC consists of some 12-15 citizens representing diverse interests, including ranchers, environmental groups, tribes, academia, and state and local governments.

Conflict over livestock grazing on public lands has become common. Critics of the current reform effort assert that the 1995 regulations have not been in effect long enough to assess their effectiveness and that the policy issues are too vague to assess their potential effects. They also contend that BLM has not justified a need for regulatory and policy changes. One concern is that the policy changes would require more monitoring than is feasible, thus possibly preventing changes, and another is that BLM and the Forest Service are not developing joint rules. There is also some disappointment among environmentalists that the reform effort does not encompass certain important issues such as altering grazing fees, controlling noxious weeds, retiring grazing permits, and establishing processes for identifying lands suitable for grazing.

Grazing Regulations

BLM asserts that some changes would be substantive while others are clarifications, but it is not clear which potential changes BLM believes fall within each category. This adds to the uncertainty over which proposals are intended to, and likely to, make major changes in public lands grazing. There is disagreement as to the extent of the environmental impact of the changes and whether that impact would be primarily beneficial or damaging in both the short- and long-terms. There also is a difference of opinion as to the extent to which the regulatory effort should reinstate pre-1995 grazing provisions or substantially modify other current provisions.

Some of the key changes identified in the proposed rule are discussed below. They involve ownership of range improvements and water rights, and opportunities for public input and appeals. Other discussed proposals pertain to terms and conditions of permits and rangeland health. These areas have been among the most controversial among affected interests.

Share Title to Range Improvements. BLM proposes reestablishing a pre-1995 rule allowing title to a structural range improvement, such as a fence, well, or pipeline, to be shared by the BLM and a permittee (or others) if it is constructed under a Cooperative Range Improvement Agreement. Title would be shared in proportion to each party's contribution to the cost of the improvement. Current regulations require documentation of a permittee's contributions to improvements and compensation if a permit is cancelled or passes to another. However, some advocate that ranchers should receive more direct compensation for improvements, would be encouraged to undertake and maintain improvements if they get title, and should be able to include improvements as assets to secure loans for grazing. Opponents charge that shared title would create private rights on public land and could hinder action to correct grazing abuses. They contend that the government should hold title to improvements as they typically are important for other uses, such as recreation and wildlife habitat. Still others believe that improvements for grazing do not necessarily benefit other land uses, and thus permittees should not be rewarded with title.

Acquire Private Water Rights. The proposed regulations would allow permittees to acquire water rights, consistent with state law. Current rules require the federal government to follow state procedural and substantive law regarding livestock watering rights, but direct that title to the rights be held by the United States

to the extent state law permits. Before 1995, practices as to water rights for livestock grazing varied and in some states could be acquired in the name of the permittee. Express language allowing private individuals to hold water rights is supported by some as providing an incentive for private water development on public land, and protecting permittees from being denied water. It is opposed by others who believe water rights should be in federal ownership to facilitate multiple uses and to preclude private claims for compensation for water rights, and because states typically do not allow grazing permittees on state lands to obtain water rights. Still others are concerned that public resources will be given away at no cost.

Reduce Requirements for Public Involvement. BLM proposes to reduce the occasions on which it is required to involve the public in its decisions. For instance, the agency would no longer be required to get input from the public regarding designation and adjustment of grazing allotment boundaries, the issuance or renewal of grazing permits, or modification of the terms and conditions of permits that are not meeting management objectives or the fundamentals of rangeland health. The agency also seeks to modify the definition of "interested public" so that only individuals, groups, and organizations who participate in the decisionmaking process on livestock grazing are maintained on the list of interested publics. The changes are sought to prevent delays and facilitate timely decisions. Also, the agency asserts that because the public already has opportunities to participate in the planning processes and during reviews under the National Environmental Policy Act (NEPA),[8] it views additional consultation as redundant. The changes are criticized as restricting public input which could lead to ill-considered decisions. The changes also are opposed because environmental reviews under NEPA are not required for some grazing decisions and because where required, such reviews are backlogged, and as a result public participation under NEPA often is delayed.

Modify the Administrative Appeals Process. The agency proposes to modify the administrative appeals process on grazing decisions and define the extent to which grazing should continue in the face of an appeal or *stay* of a decision. For instance, the proposed rule would provide that when a stay is granted on decisions involving renewing or modifying a permit or on transferring preference, the affected permittee usually would continue grazing under the immediately preceding grazing authorization, unless the stay order specified otherwise. Certain decisions would be required to be implemented, including authorizations to graze temporary forage. Other changes would specify when the terms and conditions of permits could be protested and appealed. The changes are sought to reconcile directives in the Administrative Procedure Act and to provide permittees with continuity of operations when a decision affecting their operations is appealed. The changes are opposed as limiting the ability of the public to participate in grazing decisions and potentially continuing damaging grazing practices.

Broaden the Definition of *Grazing Preference*. Another proposal would broaden the definition of *grazing preference* to include a quantitative meaning — forage on public lands, measured in AUMs — tied to a permittee's base property of land or water. The definition would continue to include a qualitative meaning — a

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[8] P.L. 91-190; 42 U.S.C. §§4321-4347.

superior or priority position to obtain a permit. The revised definition, which would be similar to pre-1995 rule language, is intended to link forage allocations to base property, give ranchers certainty as to the size of operations, and eliminate confusion as to the meaning of *preference*. Further, preference would include both *active use*, defined as use currently available on a sustained yield basis, and *suspended use*, defined as use that has been allocated for livestock grazing in the past but is currently unavailable because of insufficient forage. The new definition is opposed as infringing on the discretion of land managers to determine the extent of grazing that should be allowed.

Remedy Rangeland Health Problems. The proposal would amend the timeframe and procedures for changing grazing management after a determination that grazing practices or levels of use are significant factors in failing to achieve rangeland health standards and guidelines on an allotment. The change would allow a maximum of 24 months, rather than the current 12-month limit, for developing remedial changes in grazing practices. It also would require both assessments and monitoring of resource conditions to support agency determinations that grazing practices are a significant factor in failing to achieve, or not making significant progress towards, rangeland health standards. The change is advocated to provide a sound basis for agency determinations and to give BLM more time and flexibility in working with permittees who are not meeting the standards. It is opposed as potentially allowing damaging practices to continue and requiring excessive documentation even when damage is obvious. Opponents also claim that BLM lacks funds to collect the necessary information formally.

Remove Limit on Permit Nonuse. The proposed rule would remove the current 3-year limit on temporary nonuse of a permit by allowing permittees to apply for nonuse of all or part of a permit for up to one year at a time, for as many years as needed. The change is promoted as allowing for recovery of the land and providing flexibility to ranchers who may not be able to graze for reasons including financial hardship, drought, or overgrazing. Critics argue that the change does not address the underlying problem — permitting grazing that exceeds the capacity of allotments. Others are concerned that conservationists will obtain grazing permits and opt for extended nonuse. However, unapproved nonuse for two consecutive fee years is prohibited.

Eliminate Conservation Use Grazing Permits. Regulations allowing BLM to issue long-term *conservation use* grazing permits would be eliminated to comply with court decisions that permits should be issued for grazing and conservation needs met through other alternatives. Advocates of conservation use observe that the practice allows overgrazed land to be rested and that BLM should develop a legal alternative to the current language.

Other Proposed Changes. Other proposed changes include:

- phasing in grazing increases or decreases of more than 10% over a 5-year period (with exceptions);
- restricting BLM to taking action against a permittee convicted of breaking laws while engaged in grazing only if the violation occurred on the permittee's allotment;

- emphasizing that reviews under NEPA will consider the social, economic, and cultural impacts of proposed changes in grazing preference, in addition to the ecological impacts;
- increasing administrative fees for livestock crossing permits, billings, and preference transfers;
- clarifying that a biological assessment or evaluation by BLM under the Endangered Species Act (ESA)[9] is not an agency decision and is thus not subject to protests and appeals, and that BLM must allow permittees and the interested public to comment on biological evaluations and assessments used as a basis to change grazing use;
- specifying that BLM will cooperate with state, local, and county grazing boards in reviewing range improvements and allotment management plans on public lands;
- eliminating language providing that permits disclose the requirement that permittees provide reasonable administrative access to the BLM across private and leased lands;
- stating that the temporary changes that BLM can make within the terms and conditions of permits involve the number of livestock and period of use; and
- requiring BLM to document observations supporting a reduction in grazing intensity, and providing that reductions will be made through temporary suspensions of active use rather than through permanent reductions

Changes Not Proposed. BLM considered but did not propose many other changes to grazing regulations, according to the proposed rule and DEIS. For instance, the agency considered adopting rule language to support establishing and operating a new type of grazing unit, called a *reserve common allotment* (RCA), but did not do so because of negative public reaction to the idea. However, the BLM continues to consider the issue of forage reserves as part of its consideration of policy changes. (See below.)

The agency also considered allowing permit holders to temporarily lock gates on public lands, for instance to protect private property by preventing cattle from leaving grazing allotments and to minimize disturbances during lambing and calving seasons. The idea was opposed as preventing access by other land users, such as hunters and recreationists; giving a special privilege to permittees; and being currently prohibited by law.

BLM also did not propose altering the existing provisions under which a grazing fee surcharge is placed on permittees who allow livestock neither they nor their children own to graze on public land. The current surcharge provision was incorporated in 1995 to address concerns regarding the potential for a permittee to make a substantial profit when subleasing grazing privileges. BLM asserts that the current surcharge provision is equitable and that it does not want to address fee-related issues as part of the current reform effort.

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[9] P.L. 93-205; 16 U.S.C. §§1531-1540.

Grazing Policy

On March 25, 2003, BLM issued a press release announcing that policy changes under consideration include reserve common allotments (RCAs), conservation partnerships, voluntary allotment restructuring, conservation easement acquisition, and ESA mitigation.[10] BLM also examined the establishment of RCAs as a regulatory change, but did not propose rule language in this area. Some have asserted that other policy options under consideration might necessitate the adoption of new rules, which would require opportunities for public comment.

BLM solicited public feedback on the policy options under consideration through a series of public workshops. While some support for policy changes was expressed, many members of the public asserted that available information was inadequate to assess the policy changes, raised concerns about the outlined options, or viewed the initial schedule for considering policy and rules changes as too short. In response, BLM announced that it had extended the timeframe for developing policy changes, but did not issue a schedule for completing actions. The agency also developed and published on its website more detailed information on RCAs, conservation partnerships, and voluntary allotment restructuring. It noted that conservation easements were no longer being pursued as a major policy tool, and that the concept of ESA mitigation had evolved to the broader notion of *landscape habitat improvement*.

Reserve Common Allotments (RCAs). RCAs would serve as livestock forage for permittees while their normal allotments undergo rest or improvements, and might be used for unplanned needs, such as drought, fire, or flood. The BLM asserts that existing regulations allow the creation of RCAs but with impediments. RCAs are supported as encouraging improvements (such as a prescribed burn) and recovery from heavy grazing, and necessary in emergencies so that ranchers won't have to reduce herd size or sell out for lack of forage. Conservationists are concerned that this approach does not address what they view as the fundamental issue — overstocking or grazing unsuitable lands — and that RCAs will benefit ranchers who mismanaged their allotments. Livestock groups fear a reduction in grazing and loss of water rights through nonuse, coercion to participate, and use of RCAs as a subterfuge for conservation use. Key issues for both supporters and critics include how much land, and which lands, will become part of RCAs (e.g., vacant allotments, areas of nonuse); what will trigger their use; their term; how many permittees will be allowed to graze simultaneously; and how forage will be allocated.

Conservation Partnerships. The goal of conservation partnerships between permit holders and the BLM would be to improve environmental health. A permittee could enter into a performance-based contract with BLM to undertake projects to: restore stream banks, wetlands, and riparian areas; enhance water quantity and quality; improve wildlife or fisheries habitat; and support the recovery of threatened and endangered species, among other actions. In return, the permittee could receive

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[10] For more information on policy options, see the BLM website at: [http://www.blm.gov/nhp/efoia/wo/fy03/im2003-214ch1.htm] and [http://www.blm.gov/nhp/efoia/wo/fy03/im2003-214.htm], visited on August 27, 2003.

management flexibility, increased livestock grazing, and stewardship grants to pay for investments in conservation practices. Advocates note that these arrangements would give permittees credit for improvements they have been making, encourage and reward good stewardship, and enhance the role of permittees in managing grazing allotments. Opponents contend that private property rights could be impaired, the amount of available funding is unclear, the extent of resource improvement is uncertain, permittees might receive benefits for little or no resource improvement, and partnerships may not be entirely voluntary. Differences of opinion exist as to a role for third parties, rewards for permittees, and dealing with intermingled private land.

Voluntary Allotment Restructuring. Voluntary allotment restructuring would allow two or more grazing permittees to merge allotments. One or more of the permittees would not graze temporarily, while the others grazed over the entire area, to achieve lighter grazing. Such restructuring is supported as improving range conditions while maintaining the economic viability of permittees. Concerns include that restructuring would reduce grazing and can already occur informally, operator to operator. Issues involve when restructuring would be used and whether and how to compensate ranchers who give up grazing privileges.

Conservation Easements. Conservation easements — land use restrictions — were being considered to preserve open space. Under this arrangement, BLM would place conservation easements on its land identified for disposal. Permittees would similarly restrict development on their private land in exchange for acquiring the BLM lands with the easements. These easements were advocated as benefitting the land, land managers, and permittees. However, BLM subsequently asserted that because they are limited in their ability to use conservation easements, such easements are not currently a major policy option. Easements have been opposed as reducing land values, limiting the management discretion of private landowners, not necessarily providing a public benefit, and encumbering land disposal.

Endangered Species Act Mitigation. BLM viewed the policy options listed above as providing opportunities to mitigate the effects of livestock grazing on species listed under the Endangered Species Act. Mitigation banks also were contemplated to preserve or create habitat for listed species in exchange for mitigation credits. Such credits could be sold to other land users to offset the impacts of development on listed species. This idea raised concerns among livestock groups that grazing would be subordinated to conservation and private property rights could be weakened, and among environmentalists that permittees would be compensated for something the BLM already is obligated to protect. This concept is now being considered as *Landscape Habitat Improvement*, to promote species conservation and facilitate ESA consultations. Habitat management would be pursued on a landscape basis, perhaps involving lands under various ownerships, which presumes a larger geographic area than a grazing allotment. Grazing permittees could form partnerships to promote species conservation and maintain or improve habitat while continuing to graze public lands.

Conclusion

Nearly a year has passed since BLM notified the public of its consideration of changes to both grazing regulations and policies under its *Sustaining Working Landscapes* initiative. During this time, evaluations of possible regulatory and policy changes have been proceeding on separate tracks, and have met with mixed reaction.

Many of the key regulatory changes proposed on December 8, 2003, deal with provisions that took effect in 1995, during the last major revision of grazing rules. Among them are proposals to allow shared title to range improvements, allow private acquisition of water rights, reduce requirements for public involvement, broaden the definition of grazing preference, change the timeframe and procedures for remedying rangeland health problems, remove the limit on permit nonuse, and eliminate conservation use grazing permits. The revisiting of issues dealt with less than a decade ago, together with other proposed changes, has been generally supported by livestock organizations and some range professionals who see benefits both to the range and those grazing on public land. By contrast, many environmental organizations and other range experts oppose the changes on the grounds that a need for change has not been demonstrated and the particular proposals could harm the environment. Such differences of opinion over livestock grazing has become common.

Public comment on the proposed regulatory changes, together with the DEIS assessing their impact, will be accepted until March 2, 2004. After an evaluation of the comments, the BLM anticipates issuing a final grazing rule in October 2004 that would take effect in December 2004.

Public feedback on possible policy changes already has shaped the proposals under examination as well as extended the expected timeframe for considering changes. Key policy issues under current consideration relate to RCAs, conservation partnerships, voluntary allotment restructuring, and landscape habitat improvement. Public reaction to policy changes could become more contentious once details of the changes are developed and announced to the public.

Currently BLM is reviewing input from its Resource Advisory Councils on policy options. No timeframe for issuing policy changes has been announced, but BLM expects to develop final policy changes after the completion of the rulemaking process.