



United States Department of the Interior



OFFICE OF THE SOLICITOR
Washington, D.C. 20240

M-37001

IN REPLY REFER TO:

JAN 11 2001

Memorandum

To: Secretary
Assistant Secretary, Land and Minerals Management

From: Solicitor *John Wesley*

Subject: Proposed New Mexico Standards and Guidelines for Grazing Administration;
Evaluation and Recommendations

I. Introduction and Summary

Pursuant to 43 C.F.R. Subpart 4180 of the grazing regulations,¹ the New Mexico State Director for the Bureau of Land Management (BLM) has requested Secretarial approval of four proposed State Standards for Public Land Health and seven proposed Guidelines for Livestock Grazing Management (hereinafter "New Mexico S&Gs"). State or regional standards and guidelines developed by a State Director "may not be implemented prior to their approval by the Secretary." 43 C.F.R. § 4180.2(b). If approved, the proposed New Mexico S&Gs would replace the "fallback" standards and guidelines at 43 C.F.R. § 4180.2(f) which are now in effect in New Mexico.²

We have reviewed the New Mexico S&Gs and conclude that parts of them must be disapproved because they are, as explained below, inconsistent with the grazing regulations and other applicable law.

II. The Requirements of the Grazing Regulations

A. Overview

Under Subpart 4180, State or regional standards are "specific measures of rangeland health." 60

¹ Grazing Administration -Exclusive of Alaska, 60 Fed. Reg. 9894 (Feb. 22, 1995) (codified at 43 C.F.R. §§ 4.77, 1784.0-1 to 1784.6-2, and 4100.0-1 to 4180.2).

² BLM promulgated fallback standards and guidelines at 43 C.F.R. § 4180.2(f), to "remain in effect until State or regional standards and guidelines are in effect." 60 Fed. Reg. at 9899. The "fallbacks" were included in Rangeland Reform because "[t]he Department recognizes the importance of putting standards and guidelines in place in a timely manner." *Id.* Fallback standards and guidelines "may be modified by the Bureau of Land Management State Director, with approval of the Secretary, to address local ecosystems and management practices." 43 C.F.R. § 4180.2(b).

Fed. Reg. at 9899 (emphasis added). State or regional guidelines are “acceptable or best management practices in keeping with the characteristics of a State or region such as climate and landform.” Id. (emphasis added).

These standards and guidelines for grazing administration are a key component of the rangeland reform regulations. They help determine whether the range is healthy, and if it is not, and if livestock grazing is a significant factor in that lack of health, they require that action be taken to redress it. That is, “[a]ppropriate action” is mandatory “as soon as practicable but not later than the start of the next grazing year upon determining that existing, grazing management practices or levels of grazing use on public lands are significant factors in failing to achieve the standards and conform with the guidelines that are made effective under this section.” 43 C.F.R. § 4180.2(c) (emphasis added) (hereinafter “significant-factor determination”).

Once a “significant-factor determination” is made, the BLM may choose from among a number of appropriate actions. These include changing permitted use,³ preparing or amending an allotment management plan,⁴ authorizing range improvements,⁵ modifying the terms and conditions of permits or leases,⁶ or issuing grazing decisions.⁷

B. Fundamentals of Rangeland Health

State or regional standards and guidelines “must provide for conformance with the fundamentals of § 4180.1.” 43 C.F.R. § 4180.2(b). The “fundamentals,” also known as the “Fundamentals of Rangeland Health,” are four ecological objectives that apply to domestic livestock grazing use on public lands throughout the West. They are:

(a) Watersheds are in, or are making significant progress toward, properly functioning condition, including their upland, riparian-wetland, and aquatic components; soil and plant conditions support infiltration, soil moisture storage, and the release of water that are in balance with climate and landform and maintain or improve water quality, water quantity, and timing and duration of flow.

(b) Ecological processes, including the hydrologic cycle, nutrient cycle, and energy flow, are maintained, or there is significant progress toward their

³ See 43 C.F.R. § 4110.3.

⁴ See 43 C.F.R. § 4120.2.

⁵ See 43 C.F.R. § 4120.3.

⁶ See 43 C.F.R. § 4130.3-3.

⁷ See 43 C.F.R. Subpart 4160.

attainment, in order to support healthy biotic populations and communities.

(c) Water quality complies with State water quality standards and achieves, or is making significant progress toward achieving, established BLM management objectives such as meeting wildlife needs.

(d) Habitats are, or are making significant progress toward being, restored or maintained for Federal threatened and endangered species, Federal Proposed, Category 1 and 2 Federal candidate and other special status species.

43 C.F.R. § 4180.1. The preamble underscores that these fundamentals are, as their name indicates, the “overarching principles” that “establish the Department’s policy of managing for healthy rangelands.” 60 Fed. Reg. at 9954. For that reason, the regulations provide that the BLM “shall take appropriate action . . . upon determining that existing grazing management needs to be modified to ensure [the fundamentals are met].” 43 C.F.R. § 4180.1, first paragraph. The preamble also recognizes the fundamentals “will be supplemented by standards and guidelines that will be tailored to more local conditions.” 60 Fed. Reg. at 9954.

C. Guiding Principles

State or regional standards and guidelines also must address the so-called guiding principles at 43 C.F.R. § 4180.2(d) and (e). Guiding principles are “factors that, at a minimum, must be addressed in the development” of State or regional standards and guidelines. 60 Fed. at 9906. The guiding principles for standards are:

At a minimum, State or regional standards developed under paragraphs (a) and (b) of this section must address the following:

- (1) Watershed function;
- (2) Nutrient cycling and energy flow;
- (3) Water quality;
- (4) Habitat for endangered, threatened, proposed, Candidate 1 or 2, or special status species; and
- (5) Habitat quality for native plant and animal populations and communities.

43 C.F.R. § 4180.2(d). The regulation also lists twelve guiding principles which, at a minimum, must be addressed by State or regional guidelines developed under Subpart 4180. See 43 C.F.R. § 4180.2(e)(1)-(12).

III. The New Mexico S&Gs

The State Director has developed the New Mexico S&Gs in consultation with the affected Resource Advisory Council, as required by 43 C.F.R. § 4180.2(b), and has prepared a Record of

Decision (ROD), accompanied by a Statewide Resource Management Plan Amendment⁸ and an Environmental Impact Statement.

A. Proposed Standards

Three of the four proposed New Mexico Standards for Public Land Health -- the standards for “Upland Sites, ““Biotic Communities, Including Native, Threatened, Endangered, and Special Status Species,” and “Riparian Sites” - are based on ecological assessment and analysis, and conform with relevant provisions of the grazing regulations.

The fourth proposed standard is of a fundamentally different character. This “Sustainable Communities and Human Dimension Standard,” (hereinafter “Human Dimension Standard”) is not consistent with the BLM grazing regulations and cannot be approved, for reasons explained in the next section. It is found on page 6 of the ROD, and provides:

Economic, social and cultural elements are essential components of public land management.

When engaged in NEPA and RMP planning and decision-making for public land management, the New Mexico BLM, in consultation with Tribal, State and local governments, individuals, and other concerned public and private organizations, will use available means and measures to maintain in productive harmony, the various public land resources consistent with multiple use to best meet the present and future needs of the people, those being the permittees, lessees, other affected interests, and local communities in the maintenance of productive and sustainable ecological sites for present and future generations of Americans.

As Indicated By:

Indicators for this standard may include but are not limited to:

Efforts at conflict resolution, negotiation and communication.

Formal and informal agreements and partnerships with private landowners and others.

Consider the following factors:

Economic (income, tax base, related services, and risk assessment);

⁸ The preamble to the 1995 grazing regulations states that “State or regional standards or guidelines that are inconsistent with existing land use plans will be analyzed in land use plan amendments.” 60 Fed. Reg. at 9955.

Social (community stability, aesthetics, values and population change);

Cultural (customs or traditions, values and sense of community).

B. Proposed Guidelines

One of the seven proposed guidelines (Number Seven) does not conform with the Fundamentals of Range Health.⁹ It raises the same concerns as those associated with the Human Dimension Standard, and thus cannot be approved. It is found on page 8 of the ROD, and provides:

The public land grazing resources of New Mexico are managed on the basis of multiple use and sustained yield. Livestock grazing produces food and fiber, and contributes to a diverse, balanced, competitive, and resilient economy. Management should provide opportunities for a variety of individual choice and risk taking ventures in a responsible manner. This guideline may include, but is not limited to, consideration of impacts to employment, earnings, per capita income, investment income, Federal government payments to the State, Tribal and local governments, and tax base.

IV. Discussion and Evaluation of the Proposed New Mexico Standards and Guidelines

The basic question posed by the New Mexico S&Gs is whether BLM may consider socio-economic factors in determining whether federal rangeland is in a healthy condition. For the reasons that follow, we conclude that they may not. BLM may properly consider socio-economic factors in making a wide range of decisions about how to manage rangeland, but it may not consider such factors in making the threshold assessment of whether rangelands are in ecologically healthy condition.

The difference between the New Mexico S&Gs and the regulations may be illustrated as follows: Under the New Mexico approach, the BLM could consider the economic health of a community near an area of public rangeland in determining whether the public rangeland was in healthy condition, regardless of the condition of the public rangeland when assessed by standard ecological measurements. The New Mexico Human Dimension Standard and accompanying guideline could then become a significant-factor determination that would, under the regulations, trigger the requirement to take appropriate action. 43 C.F.R. § 4180.2(c). The ultimate result

⁹ The proposed guidelines do not clearly provide for “the use of non-native plant species only in those situations in which native species are not available in sufficient quantities or are incapable of maintaining or achieving properly functioning conditions and biological health.” 43 C.F.R. § 4180.2(e)(12). Therefore, as provided for in the regulations, the pertinent fallback guideline should remain in effect. See 43 C.F.R. § 4180.2(f)(2)(x).

could dictate a BLM decision to put more livestock on public lands that are already in poor ecological condition, in order to serve short-term local economic needs. This is not permitted by either the applicable statutes or the rangeland regulations.

To the contrary, applicable law highlights the importance of protecting the ecological health of the public lands. The Federal Land Policy and Management Act (FLPMA) sets the basic standard that public lands shall be managed for “multiple use” and “sustained yield.” See FLPMA § 102(a)(7), 43 U.S.C. § 1701(a)(7). FLPMA defines “multiple use” as “harmonious and coordinated management of the various resources without permanent impairment of the productivity of the land and the quality of the environment with consideration being given to the relative values of the resources and not necessarily to the combination of uses that will give the greatest economic return or the greatest unit output.” 43 U.S.C. § 1702(c) (emphasis added). It defines sustained yield as “achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the public lands consistent with multiple use.” 43 U.S.C. § 1702(h) (emphasis added). FLPMA also mandates that the Secretary, “[i]n managing the public lands . . . shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands.” 43 U.S.C. § 1732(b) (emphasis added). And it directs the Secretary to specify in grazing permits “the numbers of animals to be grazed and the seasons of use” and authorizes him to “reexamine the condition of the range at any time and, if he finds on re-examination that the condition of the range requires adjustment in the amount or other aspect of grazing use [he may direct the permittee to] adjust his use to the extent the Secretary... deems necessary.” 43 U.S.C. § 1752(e) (emphasis added).

In the Public Rangelands Improvement Act (PRIA), enacted two years later, Congress found that “vast segments of the public rangelands . . . are in unsatisfactory condition,” and that these conditions can be addressed by an “intensive public rangelands maintenance, management, and improvement program.” PRIA § 2(a)(1) and (4), 43 U.S.C. § 1901(a)(1) and (4). Accordingly, Congress directed the Secretary to manage public rangelands with the goal of “improv[ing] the range conditions of the public rangelands so that they become as productive as feasible in accordance with the rangeland management objectives established through the land use planning process, and consistent with the values and objectives of” the congressional findings and policies in section 2. PRIA § 4(b), 43 U.S.C. §§ 1903(b).¹⁰

This concern with ecological health of public rangelands is not new. More than four decades before FLPMA, the Taylor Grazing Act (TGA) enacted the following objectives: “To stop injury to the public grazing lands by preventing overgrazing and soil deterioration, to provide for their orderly use, improvement, and development, to stabilize the livestock industry dependent upon the public range, and for other purposes.” 48 Stat. 1269 (uncodified preamble). Accordingly, the

¹⁰ PRIA also refers to the desire to “prevent economic disruption and harm to the western livestock industry,” but in the narrow context of finding that it is “in the public interest to charge a fee for livestock grazing” on the public lands that is “based on a formula reflecting annual changes in the costs of production.” PRIA, § 2(a)(5), 43 U.S.C. § 1901(a)(5).

Act directed the Secretary to “make such rules and regulations... and do any and all things necessary to accomplish the objects of such grazing districts, namely. to regulate their occupancy and use, to preserve the land and its resources from destruction or unnecessary injury, to provide for the orderly use, improvement, and development of the range.” TGA § 2, 43 U.S.C. § 315a. As recently noted by the 10th Circuit Court of Appeals, the TGA’s goal of stabilizing the livestock industry is “secondary” to the goals of safeguarding the rangeland and providing for its orderly use. Public Lands Council v. Babbitt, 167 F.3d 1287, 1298 n.5 (10th Cir. 1999) aff’d, 120 S.Ct. 1815 (2000).

During the development of BLM’s grazing regulations, the Department considered range conditions throughout the west. The draft environmental impact statement on the proposed rules indicated that about 40 percent of upland areas and more than two-thirds of the riparian areas on BLM-managed public lands were not in properly functioning ecological condition. Rangeland Reform ‘94 Draft Environmental Impact Statement 4-21, 4-24 (1994); see also id. at GL-15 to GL-16 (defining properly functioning conditions essentially to mean capable of sustaining natural biotic communities). This was attributable largely to livestock grazing, although BLM also considered the effects of other factors, such as fire, climate, and wildlife.¹¹

The Rangeland Reform regulations were designed to improve rangeland health, forthrightly establishing as their objective “to promote healthy sustainable rangeland ecosystems.” 43 C.F.R. § 4100.0-2. The regulations require the Department to assess public rangeland health, and to use indicators and other measures that were developed in partial reliance on the work of a blue-ribbon panel that addressed the health of western uplands, watersheds, ecological processes, habitats, and species. See Report of the Committee on Rangeland Classification of the National Research Council. Rangeland Health, New Methods to Classify, Inventory, and Monitor Rangelands (1994). See generally Bruce M. Pendery, Reforming Livestock Grazing on the Public Domain: Ecosystem Management-Based Standards and Guidelines Blaze a New Path for Range Management, 27 ENVTL. L. 513 (1997).

It is no surprise, then, that the preamble to the regulations emphasizes this objective repeatedly, including specifically in its discussion of standards and guidelines. See, e.g., 60 Fed. Reg. at 9907 (“[t]he standards and guidelines in the final rule are aimed at improving the ecological health of the rangelands”); id. at 9954 (“[a]ll standards of grazing administration [are] to address factors relating to soil stability and watershed function, the distribution of nutrients and energy and the recovery of plant communities and riparian functioning conditions”); id. at 9899 (the guiding principles “pertain to the factors needed to help achieve range health”); id. at 9956 (“[t]he guiding principles for standards and guidelines require that State or regional standards and

¹¹ See, e.g., Final EIS at 69. A federal district court held that BLM’s conclusions regarding range condition were adequately supported under NEPA. Public Lands Council v. Babbitt, 929 F. Supp. 1436, 1449 (D. Wyo. 1996), rev’d in part on other issues, 167 F.3d 1287 (10th Cir. 1999), aff’d, 120 S.Ct. 1815 (2000).

guidelines address the basic components of healthy rangelands”).

In fact, many aspects of the Human Dimension Standard’s approach were analyzed and considered in the so-called “Livestock Production Alternative” in the Rangeland Reform EIS. Rangeland Reform ‘94 Draft Environmental Impact Statement 2-22, 4-77 to 4-79, 4-83 (1994).¹² This alternative would have emphasized the human component of rangeland ecosystems, and allowed more attention to have been paid to range income, employment, and social well-being in ranching communities. This alternative was not selected, primarily because it would not improve the health of the public rangeland.

Another persuasive indication that State or regional standards and guidelines must be limited to ecological factors is that this is the approach undertaken by all the other BLM state offices that have sought and obtained Secretarial approval of State or regional standards and guidelines. Nine state offices covering eleven states have submitted sixteen sets of standards and guidelines without non-ecological factors. All have been approved. BLM New Mexico is, in other words, unique in seeking to include other factors.

We have carefully considered whether there is any other reasonable interpretation of the regulations that might allow these provisions to be deemed consistent with the regulations, but have found none. The preamble explains that the fundamentals of rangeland health are designed to be implemented with “sustainable development” in mind, without defining the term. *See, e.g.* 60 Fed. Reg. at 9954, 9956. There is no indication in these discussions, however, that the basic objective of the regulations was anything other than to “improve ecological conditions” (60 Fed. Reg. at 9954) or “[result in] progress towards attaining healthy, properly functioning rangelands.” 60 Fed. Reg. at 9956. We have also considered whether the phrase “at a minimum” which precedes the lists of guiding principles¹³ might allow for factoring non-ecological factors into the assessment of rangeland health. There is nothing to indicate, however, that this phrase was intended to permit the introduction of a wholly new category of considerations into what otherwise was an exclusive concern with ecological factors.

Finally, we have also considered the argument that non-ecological standards and guidelines are appropriate to enable recognized “grazing privileges” to be “adequately safeguarded,” in the

¹² A federal district court rejected an attack on BLM’s consideration of the economic and social impacts of the regulations on the livestock industry and associated communities, noting that the Rangeland Reform EIS contains 29 pages of discussion on the subject. Public Lands Council v. Babbitt, 929 F. Supp. 1436, 1449 (D. Wyo. 1996), rev’d in part on other issues, 167 F.3d 1287 (10th Cir. 1999) aff’d, 120 S.Ct. 1815 (2000).

¹³ “At a minimum, State or regional standards . . . must address the following. . . .” “At a minimum, State or regional guidelines . . . must address the following” 43 C.F.R. § 4180.2(d) and (e).

words of section 3 of TGA, 43 U.S.C. § 315b. In considering this section of the TGA, we start with guidance recently provided in a unanimous opinion of the U.S. Supreme Court:

[The TGA] qualifies the duty to “safeguard” by referring directly to the Act’s various goals and the Secretary’s efforts to implement them. . . . The words “so are as consistent with the purposes . . . of this subchapter” and the warning that “issuance of a permit” creates no “right, title, interest or estate” make clear that the ranchers’ interest in permit stability cannot be absolute; and that the Secretary is free reasonably to determine just how, and the extent to which, “grazing privileges” shall be safeguarded, in light of the Act’s basic purposes

Public Lands Council v. Babbitt, 120 S.Ct. 1815, 1823-24 (2000) (emphasis added, citations omitted).

In the Rangeland Reform regulations, the Secretary exercised this discretion to determine just how, and the extent to which, grazing privileges shall be safeguarded. He made a reasoned decision, fully consistent with the statutory authorities discussed above, to establish a process that considers only ecological factors to determine the health of public grazing lands, as an important component of BLM’s overall administration of domestic livestock grazing.

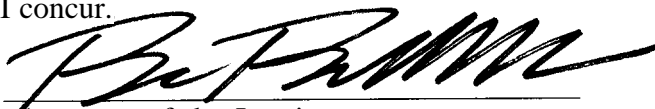
In sum, BLM New Mexico’s unique Human Dimension Standard and its similar guideline interject non-ecological factors into what the regulations contemplate is an ecologically-based analysis for assessing the health of public rangelands. If the Secretary were to approve them, it could allow socio-economic factors to override ecological ones in these assessments.

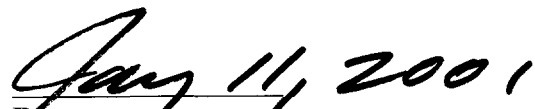
This is not to suggest that the kinds of socio-economic factors addressed in the New Mexico Standards and Guidelines have no place in rangeland management decisionmaking. They do. But it is to say that, at the initial stage of assessing and analyzing the ecological health of the rangeland, only ecological factors may be considered. If that analysis shows that the rangeland is not in an ecologically healthy condition, action must be taken to put the rangeland on a path toward health. Usually there will be a variety of measures and approaches available to help restore rangeland health, and it is in making the choice among them that the BLM may properly take into account social, economic, and cultural factors.

V. Conclusion

For the reasons discussed above, the Secretary must reject the Human Dimension Standard and Guideline Number Seven put forward by the New Mexico State Director.

I concur.


Secretary of the Interior


Date