

Where's the Beef? Facilitating Voluntary Retirements of Federal Lands from Livestock Grazing

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Introduction

Acre for acre, grazing of domestic livestock is the most widespread extractive use of the federal lands. It takes place on well over one quarter of a billion acres -- almost ten times the size of Pennsylvania. These lands are nearly all in the eleven western states. The Bureau of Land Management (BLM) in the Department of the Interior manages about 158 million of these acres, about 90% of BLM lands in the lower 48 states. The U.S. Forest Service (USFS) in the Department of Agriculture manages approximately 100 million acres, or about 60% of national forest lands in the lower 48.¹ Some 20,000 livestock operators (hereafter, ranchers) use these federal lands: BLM has issued about 18,000 permits and USFS about 7,000; several thousand ranchers have both. Collectively, these permits authorize a maximum use of about 22 million "animal unit months" (AUMs) of forage harvesting.²

Despite the vast acreage, the meat produced from public land forage is a tiny fraction (about 2%) of national meat production, and provides few jobs or economic activity in the region.³ But the ecological costs are "profound," even though it "often takes a trained eye to comprehend damage to rangeland" because the ecological harm "is so pervasive and has existed for so long that it frequently goes unnoticed."⁴ Livestock congregate in riparian areas, which are the most

¹Bureau of Land Management-Grazing, <http://www.blm.gov/wo/st/en/prog/grazing.1.html>; Public Land Statistics, 2007, Table 1-3; U.S. Dep't of Agric., *Grazing Statistical Summary*, iii (2005). As discussed briefly below (text accompanying notes 8 and 33), livestock grazing is also permitted in some units of the national wildlife refuge and national park systems.

²An AUM is the amount of forage eaten by one cow, or five sheep or goats, grazing for one month—or about 750–800 pounds of grass.

³See generally Debra Donahue, *The Western Range Revisited* 350-63 (1999); Department of the Interior, *Rangeland Reform* (draft Environmental Impact Statement, 1994) 4-118 to 4-121; Sonoran Institute, *Prosperity in the Twenty-First Century West: The Role of Protected Public Lands* (July 2004).

⁴Thomas L. Fleischner, *Ecological Costs of Livestock Grazing in Western North America*, 8 *Conservation Biology* 629 (Sept. 1994). Land in the lower 48 that has never been grazed by domestic livestock is, Fleischner notes, "extremely rare." This makes it hard to gauge the environmental effects of grazing, and Fleischner argues that studies of lands where livestock

productive habitats for flora and fauna in the arid West, where the “ecological stakes are highest.”⁵ This magnifies their adverse impacts, and is a primary reason livestock grazing affects nearly twice as many imperiled species as either logging or mining.⁶ Climate change is expected to exacerbate these impacts.⁷

For many decades conservationists have sought to ameliorate these impacts by curtailing or, in cases of the most severe damage eliminating, livestock grazing by tougher federal regulation. Their efforts have been marked more by failure than success. One measure is this: Livestock grazing continues on millions of acres of federal land that has been given protective designations like national conservation areas, monuments, and wildlife refuges. This is the result of special legislative exemption and compliant land managers. Even in many congressionally designated “wilderness” areas – the most protective federal category, designed to preserve “natural conditions” in areas “untrammeled by man” – livestock grazing is not only tolerated, but can be expanded and protected by government-sponsored extermination of wild predators.⁸

Over the last decade or so, a promising non-regulatory solution to the continued wrangling between federal lands ranchers and conservationists has emerged. It involves conservation-minded purchasers acquiring federal land grazing permits from willing sellers, and then offering to relinquish the permits to the government, if it will retire the federal lands from livestock grazing.

These marketplace-based “purchases and retirements” may achieve tangible environmental improvements in a shorter time by less contentious means than pitched battles over regulation.

have been excluded in recent years “probably underestimate[s]” grazing’s impacts because it does not reveal the “most drastic damage” that occurred many decades ago when domestic livestock, often very large herds of omnivorous sheep, were first introduced. *Id.* at 630.

⁵*Id.* at 635; see also National Research Council, *Riparian Areas: Functions and Strategies for Management* (2002).

⁶David S. Wilcove, David Rothstein, Jason Dubow, Ali Phillips, Elizabeth Losos, *Quantifying Threats to Imperiled Species in the United States*, 48 *Bioscience* 607-15 (1998).

⁷*Id.* at 613-14.

⁸About half of the congressionally-designated wilderness areas on the national forests have some livestock use. The proportion is probably substantially higher in BLM-managed wilderness areas. See generally Mitchel P. McClaran, *Livestock in Wilderness: A Review and Forecast*, 20 *Envtl. L.* 857, 857 (1990). *Forest Guardians v. Animal & Plant Health Inspection Serv.*, 309 F.3d 1141 (9th Cir. 2002), upheld a federal program to kill mountain lions in a congressionally-designated wilderness area in order to protect livestock grazing, even though the program was instituted after the area was designated wilderness.

They can help restore the health of grasslands, riparian areas, water quality, and wildlife populations. They can make it easier for government land managers to cope with drought, fire, and insect outbreaks, and to combat the invasions of exotic species. They can save the government money, because federal land livestock grazing generally costs considerably more - in managing the permits and the land, conducting predator control and other supportive activities, and dealing with the environmental damage - than any measurable benefit derived from it.⁹ Buyouts can also improve the political climate for other conservation measures on the federal lands because ranchers -- whose political influence far exceeds their numbers and economic impact -- have tended to strongly oppose such measures.¹⁰

These buyouts often make sense for the ranchers themselves. The globalization of the beef market has put the economic return from western federal-land-based livestock grazing operations below those of almost all other investments.¹¹ Sometimes, in fact, federal grazing allotments with high biological or recreational value are the most marginal and troublesome to manage for livestock. Ranchers may find it simpler to cash out of such allotments, either to retire from ranching altogether or to reorganize their operations around less highly contested pastures.

It is the premise of this paper that – because it has the potential to solve a vexing conflict of resources and values, and to restore environmental health to millions of acres of federal land –

⁹Robert H. Nelson, How to Reform Grazing Policy: Creating Forage Rights on Federal Rangelands, 8 *Fordham Env'tl. L. J.* 645, 653 (1997); see also Mark Salvo & Andy Kerr, The National Public Lands Grazing Campaign, 11 *Wild Earth* 83-85 (Fall-Winter 2001); www.publiclandsranching.org. For this reason economists have advocated grazing buyouts since the 1950s. Nelson, at 656-67.

¹⁰There are exceptions. Conservationists have sometimes formed alliances with ranchers on efforts to fight development of minerals like coal, oil and gas, and coalbed methane, and sometimes to curtail off-road vehicle use. But the two camps tend to remain at loggerheads on protecting things like endangered species, wolves and other livestock predators, water quality, and big game wildlife habitat, and natural areas.

¹¹See E.T. Bartlett, L.A. Torrell, N.R. Rimbey, et al., Valuing Grazing Use on Public Land, 55(5) *J. Range Management* 426 (Sept. 2002). Today, about half of federal land ranchers are so-called “amenity ranchers” or hobbyists who get most of their income elsewhere. Bradley J. Gentner and John A. Tanaka, Classifying Federal Public Land Grazing Permittees, 55 *J. Range Management* 2-11 (Jan. 2002). These new “amenity ranchers” are not always conservation-minded, but may be more interested in enhancing big game and sport fishery habitat (perhaps even stocking with non-native species) and limiting public access. Only a very small percentage of federal grazing permits and associated ranchland is bought by nonprofit conservation groups with a thoroughgoing conservation commitment. See William R. Travis, *Ranchland Dynamics in the Greater Yellowstone Ecosystem* 13-15 (Center of the American West, 2002).

conservation-minded acquisitions of grazing permits could be greatly expanded, except for one major problem: Those wishing to commit funds to such acquisitions on most lands managed by the BLM and USFS have no assurance that the federal lands associated with the purchased grazing permits will be permanently retired from grazing. Indeed, under current law and policy, there is a serious risk that, if the conservation buyer offers to relinquish the permits, the federal land manager may not retire them, but instead allow other ranchers to expand their operations by putting their livestock on these lands. To avoid this result, conservation buyers may find themselves being required, against their better judgment, to buy livestock and negotiate with federal land managers over how few animals may be grazed without running the risk of losing their grazing privileges for “non-use.”

This paper addresses this problem in some detail, offers a simple statutory solution, compares this solution to alternatives, and explores the politics of securing its adoption by Congress.

How We Got To This Point: A Brief History of Federal Lands Grazing

For a long time, the official U.S. policy toward livestock grazing on federal lands was silence. It was not until the depths of the Great Depression in 1934 that the Congress first addressed the subject for the largest category of federal lands - that managed by the BLM.¹² Before that, these lands were treated as a commons, open to all comers. And come the livestock operators did, literally in droves, flooding the lands with millions of head of cattle and sheep beginning in the 1880s. The courts in this era filled the vacuum left by congressional inaction by regarding the ranchers as having an implied and revocable license from the government to run their herds on the public lands.¹³

The government’s acquiescence in this use of federal land forage gave rise to a classic case of the “tragedy of the commons,”¹⁴ where each operator’s self-interest was to run as many head as possible on the “free” range before somebody else did. The consequence was predictable: In the

¹²As explained further below, text accompanying note 19 *infra*, grazing on the national forests came under minimal federal regulation in the early twentieth century.

¹³See, e.g., Buford v. Houtz, 133 U.S. 320 (1890), where the Court held that the implied license gave nomadic shepherders the privilege of crossing *private* lands of other ranchers (foraging the private grass along the way) in order to gain access to the public lands; otherwise, the Court reasoned, the rancher-landowners in that case (who were successors to a railroad land grant and owned 350,000 acres interspersed among more than 600,000 acres of public land in northern Utah), would be able to monopolize grazing on the public lands, thwarting the shepherders’ implied and equivalent license to use those same lands.

¹⁴Garrett Hardin used overgrazing on the commons as the paradigm case in his classic article, The Tragedy of the Commons, 162 *SCIENCE* 1243 (1968).

most arid parts of the West, entire ecosystems were, within the span of a few short years toward the end of the nineteenth century, degraded and permanently transformed. Environmental historian Donald Worster has likened the “invasion” by millions of introduced forage animals in

that era to the “explosive, shattering effect of all-out war.”¹⁵ Phillip Foss put it this way in his landmark 1960 study: “Overgrazing caused millions of acres of grassland to become desert. Lands which produced native grasses ‘up to your stirrups’ within the lifetime of persons now living became, and remain today, virtual deserts.”¹⁶ Drastic declines in forage, coupled with some particularly harsh winters in the north in the mid-1880s, and with drought in the southwest in 1893, led to a near-collapse of the industry.¹⁷ But it retrenched, and unrestricted grazing continued as much as the abused land would permit. Some (particularly nomadic shepherders) remained constantly on the move with their flocks. But more and more ranchers, especially those running cattle, obtained fee title to small tracts of federal land, usually along streams, under disposal laws like the Homestead Act, to take advantage of the forage on federal lands in the vicinity. This created the situation commonly found today, where a single ranch may own a few dozen or hundred acres in fee, but have permits to use many thousands, even hundreds of thousands, of acres of federal lands.

Beginning in the early 1890s, millions of acres of the open-to-all federal lands of the so-called “public domain” were designated as “forest reserves” (the original name for the national forests). After Congress gave the executive authority to regulate their “occupancy and use” in 1897,¹⁸ the new U.S. Forest Service took some halting steps to bring ranchers on these lands under modest supervision, requiring them to obtain a permit and pay a token fee, and even in some cases to limit overgrazing.¹⁹ Grazing on the much large acreage of federal lands outside the forest reserves, however, remained free and unregulated for another three decades.

¹⁵Donald Worster, *Under Western Skies: Nature and History in the American West* 45 (1992).

¹⁶Phillip Foss, *Politics and Grass: The Administration of Grazing on the Public Domain* 74, 77 (1960).

¹⁷Worster described it as one of the greatest losses of animal life in the history of pastoralism. *Id.* at 42. See also Frederick Merck, *History of the Westward Movement* 463 (1978). Future President Theodore Roosevelt’s ranch in the badlands of South Dakota suffered this fate in the terrible winter of 1886-87. Edmund Morris, *The Rise of Theodore Roosevelt* 364-67 (1979).

¹⁸16 U.S.C. §§ 478, 551. The statute, interestingly, did not mention grazing.

¹⁹See generally William D. Rowley, *U.S. Forest Service Grazing and Rangelands: A History* (1985). These steps were unsuccessfully challenged by the ranchers in court. *United States v. Grimaud*, 220 U.S. 506 (1911); *Light v. United States*, 220 U.S. 523 (1911).

As the 1920s drew to a close, overgrazing combined with drought and agricultural depression brought conditions on the public grazing lands outside the national forests to a state of crisis. By this time many public lands ranchers (as well as their longstanding champion in Congress, Edward Taylor of Colorado) were reluctantly concluding that something had to be done to address deteriorating rangelands (by then in Dust Bowl conditions) as well as conflicts among graziers. The result was the Taylor Grazing Act (TGA), signed into law by Franklin Roosevelt in 1934.²⁰

The TGA ended the tradition of free uncontrolled grazing and substituted a new regimen of permits and fees to allocate the public forage. At the same time, it reaffirmed that ranchers had only a revocable license to use the public lands, for it provided that public land grazing permits “shall not create any right, title, interest, or estate in or to the lands.”²¹ There was, however, less to this “no property right” provision than met the eye. Federal grazing permits (on both BLM and USFS lands) have long been bought and sold among ranchers, with federal approval, and are ordinarily included in the value of the ranch on the open market.²² Banks loan money against the permits, and federal capital gains and estate tax calculations reflect the value the permits have in the marketplace. This paradox – that federal land grazing permits are legally merely revocable licenses, not compensable property rights, yet nevertheless command substantial value in the private marketplace -- has led many ranchers to keep a particularly tenacious grip on public rangelands.

Despite the fact that the TGA was enacted to restore health to public rangelands, it did little to achieve this goal. Ranchers long accustomed to the open, bureaucracy-free grazing commons -- even those who welcomed its demise -- did not appreciate government interference. The result was cautious if not downright timid implementation. Federal officials often tended to act more as agents for the ranching industry than as regulators of it, and Stockmen's Advisory Boards dominated the administration of federal grazing lands for decades.²³ To ameliorate the effect on

²⁰43 U.S.C. § 315 et seq. See generally E. Louise Pepper, *The Closing of the Public Domain* 214-24 (1951).

²¹43 U.S.C. § 315b.

²² Foss, *supra* note 16, at 197; see also L. Allen Torell & Marc E. Kincaid, *Public Land Policy and the Market Value of New Mexico Ranches, 1979-1994*, 49 *J. of Range Mgmt.* 270 (1996).

²³The federal officials did have to address conflicts between those running sheep and those running cattle. To some extent this posed the issue whether to favor those with earlier use (which tended to be nomadic shepherders) or those who came later but often owned homesteaded land near the public range (cattlegrowers). Ultimately the Interior Department created a preference system that worked to favor cattle ranchers and disadvantage those who did

the ranchers of ending the commons, the new federal permits over-allocated the forage resource. Ferry Carpenter, a Harvard-trained lawyer who was the first director of the federal Grazing Service, could not have been more candid: As he put it, the choice was between moving faster and “hammer[ing] the heads of the operators unmercifully[, or going slower and] continu[ing] to hammer the public domain. Well, as the public domain range is less articulate than the stockmen, we have chosen to hammer the public domain.”²⁴ In 1946 the federal Grazing Service was merged with the old General Land Office to create the Bureau of Land Management, just in time for Senator Pat McCarran of Nevada to lead a five-year effort to starve it into submission.²⁵ The episode, and others like it, helped keep federal land managers cowed on the subject of grazing.

A quarter-century later, when federal rangeland conditions had not much improved, Congress adopted a spate of environmentally-oriented laws that seemed to brighten the prospect for making federal rangelands healthier. The fledgling modern environmental movement seized on one of these, the National Environmental Policy Act (NEPA), in the early 1970s as the best hope of improving conditions on BLM lands. Initially it won a major victory in court,²⁶ which led BLM to prepare, over more than a decade, dozens of environmental impact statements on its grazing program. These documented what was known all along; namely, overgrazing kept many public lands in unhealthy condition, and to improve matters the number of grazing animals had to be reduced or in some areas eliminated altogether. But NEPA requires only disclosure, not results. Conservation interests also attempted to use other new laws like the Clean Water Act, the Endangered Species Act, the Wild & Scenic Rivers Act, and the Federal Land Policy and Management Act (FLPMA). While these efforts occasionally met with some (albeit limited) success,²⁷ generally the courts were not very hospitable to the idea of becoming, as one federal

not own "base property" or fee land in the vicinity of the public lands. Earlier, the USFS had reached a similar resolution, tending to allocate forage in favor of those who lived or maintained ranches within or in the “immediate vicinity” of the forest reserve. See generally Leigh Raymond, *Private Rights in Public Resources* 115-117 (2003).

²⁴Raymond, *supra* note 23, at 216, n.93 (2003) (quoting transcript of statewide meeting in Oregon, Dec. 15, 1934).

²⁵Peffer, *supra* note 20, at 247.

²⁶*Natural Resources Defense Council, Inc. v. Morton*, 388 F.Supp. 829 (D.D.C. 1974), *aff'd per curiam*, 527 F.2d 1386 (D.C.Cir.1976), *cert. denied*, 427 U.S. 913 (1976).

²⁷The grazing provisions of FLPMA, enacted in 1976 (43 U.S.C. §§ 1751-53), and the Public Rangelands Improvement Act, enacted in 1978 (43 U.S.C. §§ 1901-08), both rested on a congressional determination that the rangelands remained in unhealthy condition and should be improved, but neither made major changes in the governing legal standards. See Coggins,

judge put it, the “rangemaster” for hundreds of millions of acres of federal lands.²⁸

While not notably successful, the conservationists’ campaign did spark a counter-movement. In the late 1970s ranchers on federal lands spearheaded the so-called “Sagebrush Rebellion,” which persuaded several western states to pass laws laying claim to ownership of the federal lands. (Conservationists called it the “Great Terrain Robbery.”) In 1980 presidential candidate Ronald Reagan declared himself a sagebrush rebel and once in office, made a half-hearted attempt to sell millions of acres of federal land (mostly rangeland) in the early 1980s, but the idea provoked widespread opposition and quickly foundered.²⁹

The net result of all this activity over the past four decades has been a kind of uneasy stalemate. While there has been some decline in grazing levels,³⁰ the vast majority of federal lands remain devoted to livestock grazing, and many are still in ecologically unhealthy condition.

Efforts at Grazing Reform

Advocates of federal policy reform to improve this situation have tended to fall into two predictable camps: more privatization, or more regulation.

A. Privatization

Wilkinson, Leshy & Fischman, *Federal Public Land and Resources Law* 319-28, 792-93, 798, 806-830, 1101-09 (6th Ed. 2007).

²⁸*Natural Resources Defense Council v. Hodel*, 624 F. Supp. 1045, 1048 (D.Nev. 1985), *aff’d* 819 F.2d 927 (9th Cir. 1987).

²⁹*Coggins, Wilkinson, Leshy & Fischman, Federal Public Land and Resources Law* 450-51 (6th Ed. 2007). Twenty years later, ranchers in a few rural western counties led a similar protest, this time dubbed the “County Supremacy” movement, but – in a stark reflection of the changing politics of the West - no western state government supported (and several actively opposed) the movement. *Id.* at 76-77.

³⁰“Permitted” AUMS (in BLM-speak, the total amount of allowable grazing specified in federal grazing permits) declined about a third of one percent per year from 1962 to 2005. “Authorized” AUMs (the number of livestock actually allowed on the public lands by BLM in that year, a number which is usually less than “permitted” AUMs because lack of precipitation may restrict forage in some places) declined about one percent per year in that same period. Statistics compiled from BLM’s annual *Public Lands Statistics*, 1962-2005. See also *Public Lands Council v. Babbitt*, 529 U.S. 728, 736-37 (2000) (suggesting active grazing on the public range declined from 18 million to 10 million AUMs between 1953 and 1998). BLM’s statistics may not be entirely reliable for a variety of reasons. See generally Debra Donahue, *The Western Range Revisited* 250-63 (1999).

Using the market rather than regulation to address the problem has long been the solution favored by conservative commentators and by some ranchers. The strongest version is to expand the homesteading idea under which many ranchers first acquired their “base property,” to give them fee title to the federal lands they graze.³¹ Once privatized, the argument goes, land use would respond purely to market forces. Ranchers would graze their land at the optimal level because they would bear the full cost of not doing so. If condominiums are a more efficient use of the land, the individual rancher would more likely respond to this market signal than the government.

But federal grazing lands are today used by many different interests for many purposes. Ranchers, once their primary user, now must share the terrain with the likes of hunters, anglers, hikers, skiers, off-road vehicle enthusiasts and oil, gas, mining, logging and utility companies. This makes privatization more complicated both from a political and an efficiency perspective.

Although long the official goal of national policy, privatization of what are now the national forests was effectively rejected by Congress and the President around the turn of the twentieth century. Privatization of BLM-managed lands was effectively rejected by Congress and the President in the 1930s, when the Taylor Grazing Act was passed and the remaining public domain withdrawn from most further disposal by President Franklin Roosevelt.³² Time has made the idea even less plausible to the American public and its elected officials. In the last quarter century, proposals to sell off a significant portion of federal lands around the West have been met with a resounding resistance from a wide range of interests and quickly died.³³

³¹See e.g., Gary D. Libecap, *Locking Up the Range: Federal Land Controls and Grazing* (1981); Terry L. Anderson & Donald R. Leal, *Free Market Environmentalism*, passim, esp. 37-50; 61-79 (1991).

³²See generally Peffer, *supra* note 20, at 214-24. This was shortly after the western states rejected President Hoover’s proposal to give them outright title (minus mineral rights) to these lands. *Id.* at 203-13.

³³The proposal by the Reagan Administration has already been mentioned; see note 29 *supra*. In 2005, the effort by Congressmen Richard Pombo (R-CA) and Jim Gibbons (R-NV) to reform the Mining Law in a way that could have privatized millions of acres of federal lands actually passed the House before dying a quick death in the Senate. See, e.g., Kirk Johnson & Felicity Barringer, *Bill Authorizes Private Purchase of Federal Land*, *New York Times*, 1 (November 20, 2005). In 2006 the George W. Bush Administration proposed to sell some federal lands to support public schools in areas of timber industry decline. See, e.g., Cicero A. Estrella, *Sale of Public Lands Proposed; White House Hopes to Replace Funds Lost to Logging Cutbacks*, *The San Francisco Chronicle*, February 11, 2006, at A4. All these proposals sought in part to raise revenue for various purposes, unlike the conservative proposal simply to give the federal land to

Even if privatization were politically feasible, the multiple use services derived from the federal lands call into question the efficiency gains forecast by its advocates. Formidable legal and institutional barriers prevent ranchers from collecting rentals from all the beneficiaries of services (like watershed protection, flood control, and wildlife habitat) those lands provide, and make it impossible to calibrate the efficient amount of grazing relative to other uses.³⁴ Without a market mechanism to ascertain the highest and best uses of these lands, it is unclear how privatization will allow the rancher-owner to choose the most efficient ones.³⁵

Some privatization supporters, implicitly acknowledging that giving fee ownership to ranchers is neither politically nor economically viable, have advocated giving them a narrower property right, just to the forage on the land, with the other resources and values remaining in public ownership.³⁶ They argue the federal government would save at least the estimated \$100 million it spends every year managing its grazing program.³⁷ But this approach fails to solve the difficulties just described. Not just the land but the forage itself is subject to multiple use; that is, optimizing grazing for livestock gives short shrift to wildlife. Moreover, rural and urban interests downstream benefit from a healthy vegetative cover that protects water quality, reducing treatment costs and lengthening the life of reservoirs. There are significant, probably insurmountable transaction costs in organizing all the hunters and hikers and bird watchers and farmers and city dwellers and whoever else would desire to “use” the forage into a single entity that could offer to buy it from the rancher/owner. Even if they did somehow manage to solve this

ranchers. As noted earlier, grazing also takes place in many wilderness areas and in some national parks and wildlife refuges, none of which the public has any intention of selling.

³⁴See B. Delworth Gardner, A Proposal to Reduce Misallocation of Livestock Grazing Permits, 45 J. of Farm Economics 109, 114 (February 1963) (“Due to the nature of the services and the problems of collecting rentals from the beneficiaries in the present legal and institutional setting, an efficient solution would be difficult and probably impossible.”); Mancur Olson, The Logic of Collective Action 5-65, 159-167 (rev. ed. 1971). On ecological services generally, see Nature’s Services: Societal Dependence on Natural Ecosystems (Gretchen Daily ed. 1997); Symposium on Ecological Services, 20 Stan.Env’tl.L.J. 308-536 (2001).

³⁵See Gardner, *supra* note 34, at 114.

³⁶See e.g., Robert H. Nelson, *supra* note 9, at 671-72 (1997) (describing advocates for privatizing forage rights in ranchers).

³⁷The government recovers only a small fraction of this through the small fee it charges for each AUM made available. See U.S. Government Accountability Office, Livestock Grazing: Federal; Expenditures and Receipts Vary, Depending on the Agency and the Purpose of the Fee Charged (September 2005).

problem and make an offer, the price they would pay would not accurately reflect the optimal forage value because of the significant transaction costs the buyer group would have to bear.

This problem of multiple use might be solved if the rancher's property right was only to a portion of the forage, leaving the rest for other uses such as wildlife and watershed protection.³⁸ But this approach merely replaces one regulatory regime with another, without solving the underlying problem. The government (or somebody on its behalf) would still have to calculate each year

how much forage should be available to the rancher and how much is needed for these other purposes. If the federal government is currently incapable of limiting livestock grazing to an appropriate amount of forage each year, as the condition of some federal rangelands indicates, it is not clear how this idea would produce a different result.³⁹

Beyond these somewhat technical concerns lies a more fundamental issue. As far as grazing on federal land is concerned, privatization is the problem, not the solution. The ranchers have, predictably, taken the resource effectively "sold" to them through grazing permits, and used it efficiently without taking much into consideration their external costs to other users. There is, as noted earlier, almost no surer tenure of ownership in the entire system of federal law than a grazing permit. Most everyone – from the ranchers to their bankers to the BLM – treats it as essentially a permanent entitlement.⁴⁰ Public lands forage is, in other words, already effectively privatized. If ranchers bring back the grass on their allotments by limiting grazing, it is theirs and their children's to reap in future years. It is not apparent why anything would change if the right to use the forage was changed from *de facto* to *de jure*. Ultimately, privatizing an amount of forage does not lead to healthy ecosystems because the amount of grazing that is optimum for maximizing the economic return from livestock is not the same amount that is optimum for a healthy landscape in parts of the arid west.

³⁸Cf. Nelson, *supra* note 36, at 681-682. Nelson suggests that some communal body with an undetermined but seemingly complicated system for selecting its representatives would determine the amount of grazing needed for non-ranching purposes each year.

³⁹What would be different is that the market for selling the forage right would be larger than it is now, because no longer would the stock owner be the only one competing to buy. As we will explain below, this can make a significant difference, but the advantage can be gained much more expeditiously without a new, complicated right to forage.

⁴⁰About the only way to lose a permit is to engage in some egregious scofflaw conduct over a long period of time, and even then the legal machinery moves very slowly. See, e.g., *Klump v. United States*, 50 Fed. Cl. 268 (2001), *aff'd* 30 Fed. Appx. 958 (Fed. Cir. 2002); *Diamond Bar Cattle Co. v. United States*, 168 F.3d 1209 (10th Cir. 1999); *Diamond Ring Ranch, Inc. v. Morton*, 531 F.2d 1397 (10th Cir. 1976).

B. Regulation

At the other end of the spectrum are those who advocate a more vigorous and effective regulatory approach.⁴¹ They believe that a more environmentally sensitive Executive Branch could use its ample legal authority to control livestock grazing better, and curtail at least those operations which cause the most ecological harm. Indeed, theoretically stronger enforcement could, considering the poor economics that characterize much ecologically destructive grazing, eliminate livestock grazing from many degraded federal lands. While the process would involve some expense, it likely would save the government money in the long run.

Some proponents of greater regulation make a broader point as well. They argue that ranchers should not be paid to stop doing something they have no right to do; in effect, they should not be paid to comply with environmental laws and regulations.⁴² The opposition to paying is both principled and practical. The principled argument is that ranchers should not be allowed to profit further from their use of a resource owned by all Americans, a resource they have already overused at public expense. The practical concern is that, if the political system gets into the habit of buying greater protection for the public interest, it will lose its capacity to regulate to achieve the same end. "If one owner gets paid by a land trust to avoid unwanted development, then how is it legitimate for government to prohibit another landowner from doing the same without payment?"⁴³

These arguments are not without merit. But the biggest problem with the argument for more regulation is that it represents, to borrow Samuel Johnson's famous description of a second marriage, the triumph of hope over experience. More than a century of regulatory history (for the USFS, and seventy-five years for the BLM) reveals how deeply sympathy for ranchers is embedded in agency culture -- a classic case of regulatory agency "capture."⁴⁴ Local ranchers

⁴¹See, e.g., Todd Oppenheimer, *The Rancher Subsidy*, *The Atlantic Monthly* (January 1996) p. 26.

⁴²See John D. Echeverria, *Regulating Versus Paying Land Owners to Protect the Environment*, 26 *J. of Land, Resources, and Environmental Law* 1, 39-40 (2005).

⁴³Eric T. Freyfogle, *On Private Property: Finding Common Ground on the Ownership of Land* 80 (2007 Beacon Press); see also Holly Doremus, *Shaping the Future: The Dialectic of Law and Environmental Values*, 37 *U.C. Davis L. Rev.* 233, 238 (2003).

⁴⁴BLM's current policy (Instruction Memorandum No. 2007-067, issued Feb. 20, 2007), shows clearly how the agency is culture-bound to view any acre of federal land not grazed as wasted. It finds grazing permit "relinquishments" are "an increasing concern," because there is "some expectation" that the lands will be "devoted to uses other than livestock grazing." It emphasizes that grazing retirements are "not suited for resolving" ecological degradation, and

maintain sustained pressure on agency personnel, who respond predictably. Even if conditions on the public lands are seen as intolerable, federal land managers tend to tighten regulation only after years of monitoring, and in sedulous consultation with the rancher. They know that, if they show unaccustomed vigor, ranchers can call on Members of Congress and other political actors to intervene.⁴⁵ And even if the federal land managers do act to limit the amount of grazing on particular tracts of federal land, history shows that the regulators are extremely unlikely to retire tracts of federal lands permanently from livestock grazing altogether.⁴⁶ Yet because vegetation is slow to respond in the more arid parts of the west, nothing short of permanent removal may allow that land to begin to regain health.⁴⁷

C. A Market/Regulatory Hybrid

Some conservation organizations have occasionally tried a third approach. They have bought federal grazing permits from willing seller ranchers, and then sought approval from the federal land agencies to eliminate livestock grazing on the federal lands covered by the permits. This

that retirements should only be done when BLM can determine that “there are no feasible and practicable solutions readily available that can resolve livestock grazing issues in a timely manner.” Finally, it underscores that, even if an area is retired, BLM remains free to allow “livestock use to resume on the subject area.” On agency capture more generally, see Michael C. Blumm, *Public Choice Theory and the Public Lands: Why “Multiple Use” Failed*, 18 *Harv. Env. Law Rev.* 405 (1994); William N. Eskridge, Jr. *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 *Va. L Rev.* 275 (1988).

⁴⁵A recent example is congressional direction that expiring grazing permits be renewed notwithstanding the failure of federal land managers to complete NEPA compliance; e.g., 117 Stat. 1307 (2003); 118 Stat. 3103 (2004); *Great Old Broads for Wilderness v. Kempthorne*, 452 F. Supp. 2d 71 (D.D.C. 2006).

⁴⁶Advocates of greater regulation are, as noted earlier, unlikely to achieve this result in the courts either. See note 28 *supra* and accompanying text. The exception that proves the rule is the Comb Wash case, *National Wildlife Federation v. BLM*, 140 IBLA 85 (1997); a practically unique case where the Interior Board of Land Appeals held that BLM had not, on the record before it, justified its decision to allow continued grazing on a tract of federal land despite much evidence of resource damage. Although it could have attempted such a justification and probably given significant deference had it done so, BLM instead decided to order 350 cows removed from 7000 acres of federal land. See also discussion in note 51 *infra*.

⁴⁷One range scientist estimated that grazing would need to be eliminated from only 10% of the federal rangeland to restore the riparian habitats. Jerry L. Holecheck, *Policy Changes on Federal Rangelands: A Perspective*, *J. Water and Soil Conservation* (May-June 1993). Of course, this likely requires eliminating substantially more than 10% of the livestock because riparian areas are much more productive of forage.

approach effectively changes forage use from livestock production to wildlife, watershed protection, grassland restoration, and other ecological purposes.⁴⁸

Requiring a willing conservation buyer and a willing rancher seller, this “conservation-purchase-and-retirement” approach combines privatization and regulation. Like privatization, it brings the competitive workings of the marketplace to bear, at least in part, to determine whether the best use is ranching or conservation.

Meantime, the federal government maintains its regulatory program for the federal lands that remain subject to livestock grazing. This enhances the prospect that conservation-oriented buyouts can occur in areas of greatest environmental damage, assuming that is where the federal land manager may be most likely to reduce grazing levels (and, presumably, rancher profits). The government can also enhance the efficiency of conservation-oriented buyouts by engineering trades in appropriate circumstances. That is, if a rancher is willing to sell to a conservation-oriented buyer a permit that includes relatively healthy rangeland, the federal land manager can sometimes persuade another rancher in the vicinity who is grazing more damaged land to shift her livestock off that impaired land to public land covered by the permits purchased by the conservation buyer.

In addition to attaining a solution – no grazing– that would be nearly impossible to achieve with regulation alone, the buyout serves an important distributional purpose. It protects the rancher’s economic interest in a time of transition in the rural west to a different economy. Capitalizing the subsidy to the rancher into a one-time payment, the buyout is consistent with longstanding federal policy of not seeking to maximize economic return to the Treasury from the use of federal lands, but rather to serve other objectives.⁴⁹

Purchase and retirement of grazing permits has, however, been rare -- discouraged by two problems: lack of permanence, and local opposition.

⁴⁸These kinds of acquisitions are possible even though the permits are simply “privileges” and contain no “rights” because, as noted earlier, federal grazing permits are marketable. See text accompanying note 22 *supra*. Permits under the TGA can only be granted to “settlers, residents and *other stock owners*.” 43 U.S.C. § 315b (emphasis added). The Grand Canyon Trust, a regional conservation group which has made buyouts, met this requirement by forming a livestock-owning subsidiary to hold the permits. This contortion would not be necessary under our proposal, discussed below, because conservation interests could simply pay the rancher to relinquish the TGA permit directly to the government for retirement.

⁴⁹It is not always only well-connected interests that profit from the federal government’s redistribution efforts. See Burkhard Bilger, Letter from Oregon, “The Mushroom Hunters,” *The New Yorker*, August 20, 2007, at 62 (federal land managers in Oregon allow migrant workers and other low-income people to collect highly valuable mushrooms for a nominal price).

Lack of Permanence

The Secretary of the Interior⁵⁰ has wide authority and a number of different ways to retire permits. Each of them is, however, discretionary and revocable, as follows:

1. The Secretary can merely accept the permittee's offer to relinquish an existing grazing permit, and refuse to entertain the issuance of any new grazing permit to a neighboring rancher. Ordinarily this requires little process and paperwork. But the decision can be reversed just as easily.⁵¹
2. The Secretary can "withdraw" the federal lands from livestock grazing under FLPMA. This entails somewhat more paperwork and process, including submitting a formal report to Congress. Withdrawals may not exceed twenty years in duration, and can be revoked earlier.⁵²

⁵⁰Here the discussion focuses on the Interior Secretary (acting through the BLM), but essentially the same mechanisms are available to the Agriculture Secretary (acting through the USFS) on national forest lands.

⁵¹The Public Rangelands Improvement Act of 1978 provides for retiring public land from livestock grazing either through FLPMA's land use planning process or "where . . . the Secretary determines, and sets forth his reasons for this determination, that grazing uses should be discontinued (either temporarily or permanently) on certain lands." 43 U.S.C. § 1903(b). The Interior Solicitor (full disclosure: one of the co-authors of this paper) issued an opinion on January 19, 2001 that retirements need not be based on any specific finding of harm, requiring only a determination that the public lands should be devoted to other objectives like ecological restoration or protection of wildlife habitat. The Bush (II) Administration's Solicitor (the former Executive Director of the Public Lands Council, the principal public land ranching trade association), subsequently issued two confusing opinions that, while not overruling the January 2001 Opinion, sought to discourage retirements. He warned that eliminating grazing can "disrupt the orderly use of the range, breach the Secretary's duty to adequately safeguard grazing privileges, be contrary to the protection, administration, regulation and improvement of public lands within grazing districts, hamper the government's responsibility to account for grazing receipts, [and] impede range improvements * * *." Opinion M #37008 (Oct. 4, 2002), with "clarification" issued in May 2003; see also BLM Instruction Memorandum No. 2007-067, issued Feb. 20, 2007, discussed at supra note 44.

⁵²See 43 U.S.C. §§1702(j) (definition of "withdrawal"); 1714 (processes for and limitations on withdrawals). Withdrawals can be renewed for up to twenty years at a time. See also 43 U.S.C. §1712(e), which requires notice to Congress when a management decision "excludes (that

3. The Secretary can formally amend the applicable resource management plan to provide that particular tracts shall not be grazed. Paperwork and a public process are required here as well. The plan may be amended at any time (using the same process) to rescind the retirement.⁵³

is, totally eliminates) one or more” principal uses of a tract of public land of one hundred thousand acres or more.

⁵³FLPMA specifically acknowledges this method of grazing retirement by giving an existing permittee first priority for renewal only “[s]o long as [among other things] the lands for which the permit or lease is issued remain available for * * * grazing in accordance with land use plans” prepared under FLPMA. 43 U.S.C. § 1752(c); see Solicitor’s Opinion, January 19, 2001. If the area being retired is within a “grazing district” established under the TGA, the Secretary may also excise it from the district, with a finding that the area is not "chiefly valuable" for grazing. Even if the lands are removed from a grazing district, however, the TGA gives the Secretary discretion to lease them for grazing (43 U.S.C. §315m). Therefore, taking them out of grazing districts does not make it more difficult to reintroduce livestock to them.

The market price a buyer pays for a federal grazing permit reflects the reality that a buyer can expect to have that permit perpetually. A conservation buyer would like the forage covered by his permit to be used perpetually for something other than cows. The law allows the federal land manager not only to refuse to retire the land from livestock grazing, but also to return livestock to land even if and after they are removed. This creates a grave risk that the conservation investor will not get what it paid for.⁵⁴

B. Opposition to Buyouts

If a governmental decision to retire federal lands from grazing was at little risk of reversal, the lack of legal permanence might not be a serious impediment. But a political problem exacerbates the legal one. Conservation buyouts of federal grazing permits can trigger opposition and paralyze federal land managers. The best (or worst) example occurred in the Grand Staircase Escalante National Monument in southern Utah. The Grand Canyon Trust⁵⁵ purchased permits from willing-seller local ranchers, including a county commissioner, and asked the BLM to amend the pertinent land use plan to retire the land from grazing (at least for the duration of the plan). The idea was supported by the local BLM office. Initially, all political signs looked favorable. The local Congressman, Chris Cannon, wrote Interior Secretary Gale Norton to urge her “to support this worthwhile effort.”⁵⁶ Norton, who had advocated “free market” solutions earlier in her career when she worked for the conservative, market-oriented Mountain States Legal Foundation, responded that she “strongly endorsed this action,” because “this type of market-based solution can provide an excellent opportunity for local groups to work together to benefit the community

⁵⁴The Clinton Administration tried a slightly different approach to the problem. Its “rangeland reform” regulations gave the Interior Secretary authority to issue TGA grazing permits for “conservation use,” which meant the land covered by the permit would not be used by livestock for the permit term (ordinarily, ten years). Although the provision allowed the Secretary to issue “conservation use” permits only when the permittee requested it, the ranchers’ trade association challenged it, and a federal appellate court struck it down, holding that the TGA did not authorize the issuance of permits not to graze livestock. *Public Lands Council v. Babbitt*, 167 F.3d 1287, 1308 (10th Cir. 1999); rev’d on other grounds, 529 U.S. 728 (2000). This decision precludes the Secretary from halting all grazing on lands covered by a TGA permit other than through annual determinations of how much, if any, use is appropriate. Presumably, the Secretary could issue a conservation buyer a permit under FLPMA (rather than the TGA) authorizing it to use the land formerly grazed for wildlife habitat and ecological restoration, but this would not preclude a Secretary from issuing a TGA permit to a rancher to reintroduce cows to the same land.

⁵⁵One of the co-authors is on the Board of the Trust and both are affiliated with a foundation that provides funds to the Trust.

⁵⁶Letter from Chris Cannon, Member of Congress, to Gale A. Norton, dated April 12, 2001.

and the land.”⁵⁷

It was not long, however, before a strong lobbying campaign against retirement was mounted. Every single commissioner in the two counties involved – including the rancher-commissioner who had sold permits to the Trust – signed a letter opposing it.⁵⁸ According to Interior Department sources who must remain confidential, the entire Utah congressional delegation, including Congressman Cannon, came to oppose the retirement. The Secretary bowed to the pressure and ordered BLM to postpone work on the plan amendment. Six years later, the BLM has still not finished the necessary paperwork to make a decision whether to retire the land from grazing.

Such opposition is not unexpected. Neighboring ranchers may oppose retirement because they may wish to use those pastures to expand their own herds, or at least view them as backup forage if their own allotments become unavailable because of circumstances like drought. Opposition may also come from what economists call “third parties” in the community – interests like the local bank, feed supplier, and farm and ranch implement dealer. While the ranching industry and its suppliers have dwindled to a relatively small part of the economic base of most rural western communities,⁵⁹ they often continue to have great sway over local politicians. For their part, ranchers’ trade associations like the Public Lands Council see retirements as eroding their institutional and political power. Accordingly, they favor allowing ranchers to sell permits only to other ranchers, even though limiting the market this way probably leads to lower prices for their rancher-members who want to sell.⁶⁰ Finally, and perhaps most important, there can be stout opposition based on ideology and culture. Rural western communities often strongly identify themselves as ranching communities no matter how little ranching contributes to the local economy, leading them to oppose any movement to end livestock grazing on some federal lands.

The purchase-and-retirement strategy has worked in a few places where special circumstances provide sufficient security that the retirement will be permanent. Sometimes Congress itself has

⁵⁷Letter from Secretary Norton to Chris Cannon dated August 3, 2001. Secretary Norton had earlier supported the project in an April 23, 2001 letter to Terry Anderson, a noted “free market environmentalist.” Lynn Scarlett, then Interior’s Assistant Secretary of Policy, Budget and Administration (and, as of this writing, Deputy Secretary), who had also supported market solutions in her prior position at the libertarian Reason Foundation, expressed similar sentiments. Letter from Lynn Scarlett, Assistant Secretary Policy, Management and Budget to Geoffrey Barnard, President, Grand Canyon Trust (November 6, 2001).

⁵⁸[Searching for a copy of this letter.]

⁵⁹See note 3 supra and accompanying text.

⁶⁰As mentioned in note 48, currently only stock owners can buy permits.

provided the security, by specifically authorizing federal lands that are being used for military or conservation purposes to be retired from livestock grazing upon relinquishment of the grazing permits.⁶¹ Grazing retirements have also occurred where the Endangered Species Act (ESA)⁶², a powerful federal regulatory statute, was involved, because it furnished conservation purchasers with considerable confidence that the retirement decision would be difficult to undo. In national forests in the northern Rockies, for example, conservationists bought grazing permits from ranchers and persuaded the USFS to amend its management plan to retire the area from grazing in order to eliminate conflicts with grizzly bears protected under the ESA.⁶³ Other federal laws may operate with similar effect. On National Wildlife Refuges, livestock grazing is generally permitted only where, “in the sound professional judgment of the Director [of the U.S. Fish & Wildlife Service, it] will not materially interfere with or detract from the fulfillment of the mission of the National Wildlife Refuge System or the purposes of the [individual] refuge.”⁶⁴ This can raise the bar against resumption of grazing high enough to warrant investment in conservation purchases.⁶⁵

The situations where conservation purchases and retirements have been achieved remain exceptional. On the more than two hundred million acres of federal grazing lands where such confidence-building laws and restrictions do not exist, the experience of the Grand Canyon Trust – where locally-led opposition to grazing retirements and the reluctance of the government to move forward in the face of it – has chilled conservation investments and perpetuated environmental degradation.

D. The Solution

The solution we proffer is a statute (see Appendix A) that directs the responsible federal agency

⁶¹See the grazing provisions in the 1986 legislation establishing the Great Basin National Park in Nevada (16 U.S.C. 410mm-1(e)(2)(B)); in the 1994 legislation establishing the Mojave National Park and Preserve, California Desert (16 U.S.C. § 410aaa-50); and in the 1998 legislation enlarging Arches National Park in Utah, 16 U.S.C. § 272b(b)). See also the Central Idaho Economic Development and Recreation Act, H.R. 222 (109th Cong.).

⁶²16 U.S.C. §§ 1531-1543.

⁶³See, e.g., Tom Kenworthy, Coalition “Retires” Grazing Area in Wyoming, USA Today, August 1, 2003 at A4.

⁶⁴16 U.S.C. § 668ee(1).

⁶⁵This occurred in the Hart Mountain National Wildlife Refuge. See Michael Bean and Melanie Rowland, *The Evolution of National Wildlife Law* 297-98 (3d ed. 1997); the *Wilderness Society v. Babbitt*, 5 F.3d 383 (9th Cir. 1993).

to retire federal land from grazing permanently if the holder of the federal permit requests it.⁶⁶ In one simple stroke it would remove the two major obstacles to conservation investments in grazing buyouts: It would be essentially permanent (the statute would deny the agency authority to reintroduce livestock on the public land once removed) and, being automatic, could not be stopped by local opposition. It would work only for full-fledged retirements, and not merely for reductions in the number of livestock grazing in a particular area. The government's regulatory authority would remain available to reduce (and, if appropriate, eliminate) livestock grazing where advisable.⁶⁷

Our solution would bring more private philanthropic capital to bear, because conservation buyers would have assurance they would get what they are paying for -- no more livestock grazing. Of course, Congress retains the authority to enact legislation opening particular tracts of retired land back up to livestock grazing. But this has never occurred to our knowledge, and thus we are confident our proposed statute provides sufficient real-world certainty to motivate many conservation investors.⁶⁸

Beyond providing permanence, our proposed generic legislation insulates specific retirement decisions from local politics, once a rancher decides to sell to a conservation buyer. By enacting our proposed statute, Congress would be making a national policy decision for the lands managed by the BLM and U.S. Forest Service. This is appropriate because, so long as the lands are owned by the whole nation, the ultimate test is what best serves the national interest. We hasten to add that the statute would not operate unless the owner of the grazing permit decided to sell the permit to the conservation buyer. Opponents of grazing retirement remain free either to outbid the conservation buyer or to persuade the rancher not to sell. But our proposal would not allow opponents to use local political pressure to override the decision, once the rancher and the

⁶⁶See Appendix.

⁶⁷A useful adjunct would be legislation that would replicate the tax deductibility of conservation easements. See I.R.C. § 170(c). This would allow ranchers who relinquish their permits back to the government to deduct the market value of those permits. To maximize conservation value and minimize the possibility of gaming the system, the deduction should be available only if entire pastures were completely and permanently retired.

⁶⁸Some have contended that this degree of permanence in land use decisions is unwise because we cannot know what land uses will be sensible decades down the road. See generally Julia D. Mahoney, *Perpetual Restrictions on Land and the Problem of the Future*, 88 Va. L. Rev. 739 (2002). That has not prevented Congress from deciding to allow tax deductions only for "perpetual" conservation easements. See I.R.C. § 170(h)(5)(A) (2007); 26 C.F.R. § 1.170A-14(a). Moreover, should circumstances change dramatically, Congress could reverse course and open retired federal lands back up to livestock grazing, though that would be unlikely..

conservation buyer strike a deal.

D. Criteria for Hybrid Market/Regulatory Solutions

Those who oppose “buying” conservation in a regulated environment make a number of credible arguments. In our view, the key to successfully mixing the market and regulatory approaches is to do it in such a way as to address valid reasons for concern. That is, we generally agree that buying conservation is bad public policy in circumstances where it significantly undermines regulation,⁶⁹ or when it is an inefficient or ineffective use of public resources, such as when it costs much for only temporary change or marginal benefits. We believe that the solution we advocate here – using private, albeit tax-subsidized⁷⁰ funds to permanently retire federal grazing permits-- avoids these pitfalls while bringing many benefits of the market to bear on the problem.

First, we believe our proposal is unlikely to undermine existing regulation. Decades of mostly unsuccessful conservationist advocacy and litigation for tougher regulation make it clear that many degraded federal lands will not be retired from grazing by regulation alone. Federal land managers have almost never used the regulatory tool to eliminate livestock grazing even when the health of the land plainly requires it.⁷¹

We do not believe our proposal would undermine the government’s regulation of livestock grazing elsewhere on the federal lands, any more than an easement purchased to forestall development on a particular piece of land undermines the government’s appetite to regulate building size and location throughout the neighborhood. Specifically, we do not expect federal

⁶⁹See Echeverria, *supra* note 42, and accompanying text.

⁷⁰The tax subsidy occurs either through the tax deduction given a donor to one of the tax exempt conservation organizations purchasing the permit, or where the rancher takes a tax deduction when she donates her permit (if such a deduction is allowed, see footnote 67, *supra*). Although our proposal is aimed at privately-funded (albeit tax-subsidized) conservation purchases, there is no reason it could not be applied to buyouts achieved by more direct application of public funds. Such buyouts have occurred where the Endangered Species Act and other special circumstances foster confidence that retirements will be permanent. In Clark County, Nevada, public land grazing permits were purchased and retired with public and private funds in order to create a habitat conservation plan for the desert tortoise, a species subject to the ESA’s protection, in order to allow more development elsewhere. Desert Tortoise Habitat Conservation Plan, Clark County, NV (1991). In Idaho, with the support of the local Indian Tribe and the state Department of Game and Fish, the Bonneville Power Administration used fish restoration funds to buy and retire grazing permits on national forest land that was prime habitat for several endangered fish.

⁷¹See note 45 *supra*.

land managers to alter whatever level of effort they are making toward achieving ecological health on public rangelands simply because a method has been created to facilitate retiring some federal land from grazing altogether.

Buying grazing permits to remove livestock from tracts of federal lands would not work to recognize a new property right for ranchers. For many decades federal grazing permits have been bought and sold in the private market, with private funds, without undermining the federal policy, clearly expressed in federal law, that the grazing permit carries with it no property interest to federal land. Ranchers have kept up a steady stream of litigation seeking to gain property rights in federal lands comparable to those of miners and some others, but the courts have consistently ruled against them.⁷² It is hard to imagine that our proposed federal statute will transform the legal landscape in this area.

⁷²Most recently, federal and state courts have rejected ranchers' claims that the water rights they perfect under state law in association with their federal land grazing permits carry with them any sort of right, compensable or otherwise, to graze federal land. See *Colvin Cattle Co. v. United States*, 466 F.3d 803 (Fed. Cir. 2006); *Walker v. United States*, 162 P.2d 882 (N.M., 2007).

Our solution also minimizes the problem of using tax-subsidized funds to secure only marginal or temporary conservation. If past experience is an indicator, philanthropic organizations most likely to fund conservation-oriented grazing buyouts will have access to good, site-specific information about the conservation benefits that might be generated from retirements; indeed, their information is often better than the government's (the BLM's in particular). Furthermore, with limited funds, they have an incentive to ensure they are purchasing the permits most in need of retirement. Also, as noted earlier, the government has some ability to move grazing around by adjusting different ranchers' grazing patterns in order to retire the most damaged lands in the area.⁷³

Another objection to our proposed solution is that it allows conservation buyers to turn what is at least nominally a public decision – whether particular tracts of federal lands are to be grazed by domestic livestock -- into a private decision. That is, under our proposal if a conservation buyer like The Nature Conservancy decides there should be no grazing on a tract of federal land, and the rancher with the grazing permit is willing to sell to TNC, the federal land will not be grazed. This is the case regardless whether the federal land managing agency, the surrounding landowners or the local communities agree. The concern here echoes a criticism sometimes leveled at conservation easements, that the public treasury is putting up the money (through the tax deduction) but the “choice about what land to protect is, for all intents and purposes, delegated to private owners.”⁷⁴

We do not find this argument persuasive in this context. For one thing, to the extent the proposal contemplates the use of tax-subsidized dollars to fund grazing retirements, the decision to retire the land is a public decision, not a private one – albeit a generic policy decision made by the U.S. Congress, rather than a site-specific decision by an official in the executive branch. Second, even when the decision about which particular federal lands will be retired is a private one (made by the rancher-seller and private conservation buyer), the result is a typical feature of

⁷³See text following footnote 48, *supra*. We have noted (footnote 69, *supra*) the possibility of giving ranchers who donate their permits a tax deduction comparable to that obtained by donating a conservation easement. Many critics have pointed out the inefficient character of conservation easements – their conservation benefits may not approach their cost to the public treasury because in many situations those donating or selling the easement have no intention of developing anything for the foreseeable future, and those on the verge of development are unlikely to donate or sell an easement no matter how much conservation benefit would result. See, e.g., Echeverria, *supra* note 42 at 21-22. We do not believe that is so big a problem in the federal land grazing context. Ranchers may be mostly likely to donate and retire permits to graze those federal lands which are most expensive to manage, and which produce the least profit, and we believe that in many cases those lands are likely to be the ones suffering the most ecologically.

⁷⁴Echeverria, *supra* note 42 at 8.

tax policy. The generic tax subsidy for charitable activities leaves the question of how the subsidy is used, and whether it is used wisely, largely beyond public oversight except at the grossest level.⁷⁵

Finally, it is entirely consistent with the historical evolution of federal land policy for Congress to decide federal grazing retirement policy generically, rather than to leave it to the executive branch through tract-by-tract decisions. For much of the nation's history, until around the turn of the twentieth century, private interests directly dictated what happened to federal lands.⁷⁶ Private livestock herders decided by their actions, without any sanction by Congress, that much of the federal lands would be grazed by domestic livestock. In that same earlier era, Congress gave homesteaders and other settlers, miners, railroads and others free rein to choose federal lands to pursue their missions, because Congress decided settling and developing these lands was in the national interest.

Over the course of the twentieth century, Congress gradually changed policy. One change was to supplant private decisionmaking by enlarging the authority and discretion of the executive branch to decide how federal lands would be used. (But even in so doing, Congress left wide running room for private decisions about federal land use, for federal minerals are not developed nor federal trees harvested nor federal grass grazed by livestock unless private industry is willing to undertake the job.) Another change, even more pertinent to the present context, was that Congress increasingly decided for itself to favor one kind of land use and management over another. These generic congressional decisions were made principally in the direction of conservation, as exemplified by the trend, still underway, to put more and more tracts of federal lands in the national park and wilderness and other conservation systems. The solution we propose is entirely consistent with both the long history of Congress making generic national decisions implemented locally through private decisionmaking, and the seemingly inexorable trend of congressional decisions promoting conservation on federal lands.

E. Conclusion

Adopting the simple statutory solution we propose offers the opportunity to restore environmental health to millions of acres of land, and to reduce continuing conflict between ranchers and conservation interests. In addition, we believe the approach we recommend here might work in some other contexts to stop overexploitation and promote conservation of natural resources. As we see it, the following are some of the key features of this hybrid between regulation and private markets.

⁷⁵Of course, to the extent public funds are used directly for grazing buyouts, see footnote 70 supra, this problem of the private character of the retirement decision would attenuate.

⁷⁶See Blumm, supra note 44.

1. The hybrid solution is necessarily ad hoc, tailored to fit the specific factual and regulatory context and crafted to address the exact problem.
2. It creates no new private rights in public resources. Instead, it makes relatively small changes in the regulatory framework in order to permit private solutions to complement the regulatory regime, to provide both efficiency and distributional benefits. The continued enforcement of the regulatory regime remains an essential element of the hybrid solution.
3. It involves a market-setting mechanism, a new law, aimed at creating some legal certainty to furnish a conservation purchaser strong assurance that it will receive the conservation values it seeks.
4. It is aimed at achieving an objective that a long history has persuasively shown is unattainable by regulation alone.

This approach has value in other situations, such as to make it easier to protect conservation values on areas of federal land where private rights exist. A number of areas of federal land with high conservation values, and considerable public support for protecting these values, are subject to existing mineral leases, timber sale contracts and the like. Conservation-oriented dollars may be available to buy up those leases or contracts from willing sellers (who may not want the controversy of trying to develop the area by exercising their rights) and relinquish them back to the government. But, as with livestock grazing permits, this is often risky because federal land managers retain the authority to issue new leases or timber sale contracts. A solution comparable to what we offer here for livestock grazing is for Congress to legislate to protect the conservation values of the area, withdrawing it from new leasing, timber sales, and the like, while protecting valid existing rights. This creates a framework of permanence that would allow conservation dollars to be used to buy the outstanding private rights from willing sellers. Such a solution was adopted by Congress in 2006 in the Rocky Mountain Front of Montana,⁷⁷ and is currently before Congress in the Wyoming Range Legacy Act of 2007 introduced by Wyoming Senator John Barrasso.⁷⁸

Another possible context for the hybrid approach is ocean fishing. Buying out fishing licenses or quotas to reduce overfishing has always been problematic because conservationists could not stop others from taking fish in like quantities in the same places. In the Northwestern Hawaiian Islands, the Pew Charitable Trusts had been considering buying out fishing licenses to protect the marine ecosystem, but balking because of the inability to provide permanence. The impermanence problem was solved when, in June 2006, President Bush proclaimed the Northwestern Hawaiian Islands Marine National Monument and authorized the permanent

⁷⁷Title IV, Section 403, included in H.R. 6111, Tax Relief and Health Care Act of 2006 (inserted in the Senate version of this bill in the lame duck congressional session).

⁷⁸S. 2229 (109th Cong.).

retirement of fishing licenses in the area if they were offered back to the government. Pew then opened negotiations to buy out the fishing licenses immediately so long as they were permanently retired.⁷⁹

APPENDIX A

“Whenever, for the stated purpose of retiring a specific tract of federal land from all livestock grazing in order to further the conservation of public resources, the holder of a permit to graze livestock on that tract makes an irrevocable offer, in writing, to relinquish the permit to the federal agency responsible for managing that land, the federal agency shall forthwith withdraw that federal land from grazing, and make conforming changes in the pertinent resource management plan. The withdrawal shall be effective, and the changes in the plan completed, within sixty days of receipt of the request, and shall remain in effect until the Congress provides otherwise.”

⁷⁹Pew agree to consider the buyout if all eight of the existing fishing permit holders agreed to sell, if the compensation was based on fair market value as determined by catch history and fishing income, and if the federal government agreed to retire the fishing permits permanently, and not reissue new ones. See Pew Charitable Trusts Opens Formal Discussions with Northwestern Hawaiian Islands Fisherman, pewtrusts.org/new_room/iktid19740.as (January 4, 2008). Pew eventually abandoned its efforts, however, after only two of the permit holders showed interest. See Jan TenBruggencate, Pew Trust Gives Up On Fishermen Buyouts, *The Honolulu Advertiser*, Nov. 3, 2006, at 5B.