
AMERICAN
PRAIRIE
RESERVE

A Response to

"Repurposing of Federally-Reserved Taylor Grazing Districts for Wildlife Rewilding: A Statutory, Administrative and Legal Analysis."[1]

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INTRODUCTION

The “Repurposing” Memorandum (Memo) referenced in the caption was submitted in opposition to APR’s application to the Bureau of Land Management (BLM) to change grazing on some of its public land allotments from cows to bison. At the request of APR, we have analyzed the Memo and prepared this response.

The Memo offers several arguments that boil down to a single contention—that federal law, principally the Taylor Grazing Act of 1934 (TGA) and the Federal Land Policy & Management Act of 1976 (FLPMA), requires the BLM to give grazing by cows and sheep a priority higher than any other use that might be made of the public lands. Accordingly, it asserts that the BLM may approve APR’s proposed change to bison grazing only if the BLM finds it compatible with grazing by cattle and/or sheep. The Memo makes essentially the same argument regarding the legality of bison grazing on the nearby Charles M. Russell National Wildlife Refuge (Refuge), where APR has held grazing leases in the past.

KEY TAKEAWAYS

The Memo’s arguments have no support in the laws Congress has enacted. Neither the TGA nor FLPMA makes grazing by cows and sheep the highest priority use of public lands.

- First, these laws do not define the animals that BLM can authorize to graze in grazing permits, and thus do not foreclose the BLM from issuing permits for grazing by bison as well as, or instead of, by cattle or sheep.

- Second, grazing is just one of many authorized uses of public lands, with no higher priority than any other. Indeed, these laws, along with the Public Rangeland Improvement Act of 1978 (PRIA), make clear that the BLM does not have to issue grazing permits at all, and can instead decide to leave lands completely un-grazed by domesticated livestock.

- Third, the TGA’s authorization to establish “grazing districts” containing public lands deemed “chiefly valuable for grazing” does not affect the first two conclusions. For example, Congress has specifically provided for lands inside grazing districts to be retired from livestock grazing without any need to re-examine the “chiefly valuable” classification. In fact, the TGA gives very little legal significance to “grazing districts” and their “chiefly valuable” classification; for example, it provides the BLM with comparable authority to issue (or not issue) grazing leases on public lands outside of grazing districts.

The position taken in the Memo is contradicted by many decades of practice by the BLM and by an Opinion of the Interior Solicitor issued in 2003.

- The BLM has long taken the position that it may issue bison grazing permits or leases under the TGA and FLPMA, and that it may modify existing permits to substitute bison for cattle. The BLM has done both things for decades in numerous allotments in several states across the West. In the specific case of APR, the BLM has approved the substitution of bison for cattle on several of APR's allotments, dating back more than a decade.

- The 2003 Solicitor's Opinion ruled that public lands in grazing districts need not be reclassified as not "chiefly valuable" for grazing in order to be retired from grazing. If retiring lands from grazing requires no reclassification, neither can merely substituting bison for cattle, and in fact, none of the BLM's approvals substituting bison for cattle involved reclassifying lands in grazing districts.

The position taken in the Memo is contradicted by the most recent (and unanimous) decision of the U.S. Supreme Court addressing the scope of the Interior Department's TGA and FLPMA authority over grazing on the public lands.

- The Memo erroneously relies on an earlier, lower court decision in that same case (a decision not reviewed by the Supreme Court), that ruled on an entirely different question; namely, whether the Department could issue a grazing permit for a purpose that involved no grazing at all by any domesticated livestock.

Insofar as grazing on the Refuge is concerned, it was originally established as a "game range" by President Franklin Roosevelt in 1936, with wildlife and livestock having comparable status, and the grazing managed by the BLM.

- In 1976 Congress decided to make the area part of the National Wildlife Refuge System, and to give the U.S. Fish & Wildlife Service (FWS) sole authority to manage it. Livestock grazing permittees on the Refuge then brought a lawsuit seeking to establish that the TGA continued to govern grazing within the Refuge. They lost. The Federal Court of Appeals ruled that Congress's 1976 action meant the TGA no longer had any application to lands within the Refuge. Livestock grazing remains a secondary purpose of the Refuge, but the FWS has broad discretion to manage the Refuge primarily to protect wildlife and has long done so.

Finally, it is worth noting that the arguments put forth in Memo essentially seek to undermine APR's grazing privileges as recognized by the TGA.

- APR holds base property and qualifies for a preference under 43 U.S.C. § 315b. It seeks an adjustment in its grazing permits, just as others who hold TGA permits may seek to adjust type of livestock, seasons of use, or terms and conditions to better serve their private purposes.

- While neither APR nor any lease or permit holder has a right to insist upon such a modification, APR is entitled to the same consideration as any other permit holder seeking adjustment. It is, in short, the Memo, not APR, that seeks to create new restrictions on grazing permits and on the BLM's authority to adjust them in light of changing needs and circumstances.

BACKGROUND

According to information APR has supplied us, it has several times in the past sought and obtained BLM approval to change grazing on some of its allotments from cows to bison. (Its requests sometimes also included altering the grazing pattern from seasonal to year-round and removing some interior fencing.) BLM Decisions, August 26, 2005; February 20, 2008; May 19, 2008; February 2, 2014.

In November 2017, APR applied for similar changes for its grazing permits on eighteen BLM allotments (and 20 leases it holds on interspersed state land), altogether covering some 290,000 acres of public land.

In early 2019, the Montana Legislature passed a non-binding resolution expressing concern with APR's proposal. In response, APR revised its application so that it covered only six BLM allotments (and six leases it holds on interspersed state land) or some 48,000 acres of state and federal lands. Under the revised application, only one BLM allotment and one state lease (embracing a total of some 12,000 acres) would see year-round grazing, and only 40 miles of interior fencing would be removed, much of which lies on land owned by APR. https://eplanning.blm.gov/eplanning-ui/project/103543/510. That request is currently pending before the BLM.

APR has also acquired properties that had grazing leases on the nearby Refuge, administered by the FWS. These leases have been retired. APR also for some time held a lease from the FWS to graze a small number of bison seasonally on the Refuge, but this lease is no longer in force.

OVERVIEW OF THE MEMO'S ARGUMENTS AND OUR RESPONSE

The Memo makes the following principal arguments:

- Because grazing districts are established under the TGA on public lands that are considered to be "chiefly valuable for grazing," the BLM must give grazing by cows and sheep a higher priority than all other uses. Specifically, grazing by cattle and/or sheep is in "preeminent position" above the "remaining land use values" and constitutes a "first-among-equals principal use." Memo, p. 9.

- That "pre-eminent position," combined with the "multiple use" doctrine contained in FLPMA, puts severe constraints on the BLM's authority to grant APR a change in use to permit bison grazing on its allotments. The BLM can approve such a change only if it finds it compatible with grazing by traditional domestic livestock.

- The legal standards governing the Refuge (which was first established as a "game range" by presidential executive order in 1936) likewise make grazing by cattle and sheep a dominant use, and thus similarly limit the FWS's authority to permit bison grazing.

Many of these arguments are unresponsive to APR's proposal, because APR does not seek to retire grazing permits, but rather has sought permission to change its grazing use from cattle to bison. Nonetheless, we respond to all the principal legal contentions in the Memo in the following parts:

The first part provides an overview explaining why livestock grazing does not have preeminent legal status on public lands under the TGA and FLPMA.

The second part explains how the "chiefly valuable for grazing" classification in the TGA has very little legal significance and has never been deemed an obstacle to the BLM deciding to retire lands within grazing districts from livestock grazing. It shows how Congress has clearly provided for such retirement, inside as well as outside grazing districts, without requiring a re-examining of the "chiefly valuable" classification of land in grazing districts. Finally, it shows how a legal opinion from the Interior Solicitor also makes clear that reclassification is not required.

The third part explains the BLM's legal authority to issue bison grazing permits or leases, and to approve changes in use from cattle to bison. It also shows how the BLM has, over a period of years, done both in several places around the West, including on allotments for which APR holds permits.

The fourth part explains why the Memo's argument based on the Federal Power Act is irrelevant.

The fifth part explains the errors in the Memo's argument that livestock grazing is a dominant use of Refuge lands.

I. Livestock Grazing is Not Given Preeminent Legal Status on Public Lands

Nothing in the TGA and FLPMA supports the principle that domestic livestock use by cows and sheep is "preeminent" or "first-among-equals," and must be given preference over all other uses, including grazing by bison.

The BLM's authority over, and responsibility for, livestock grazing on public lands was most succinctly and authoritatively explained in a unanimous decision of the U.S. Supreme Court twenty years ago. *Public Lands Council v. Babbitt*, 529 U.S. 728, 733-38 (2000). There, the Court said (particularly pertinent passages emphasized in bold):

> The Taylor Act seeks to "promote the highest use of the public lands." 43 U.S.C. § 315. Its specific goals are to "stop injury" to the lands from "overgrazing and soil deterioration," to "provide for their use, improvement and development," and "to stabilize the livestock industry dependent on the public range." 48 Stat. 1269. The Act grants the Secretary of the Interior authority to divide the public rangelands into grazing districts, to specify the amount of grazing permitted in each district, to issue leases or permits "to graze livestock," and to charge "reasonable fees" for use of the land. 43 U. S. C. §§ 315, 315a, 315b. It specifies that preference in respect to grazing permits "shall be given … to those within or near" a grazing district "who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights." § 315b. And, as particularly relevant here, it adds:
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> > So far as consistent with the purposes and provisions of this subchapter, grazing privileges recognized and acknowledged shall be adequately safeguarded, but the creation of a grazing district or the issuance of a permit … shall not create any right, title, interest, or estate in or to the lands." *Ibid.*
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> As grazing allocations were determined, the Department would issue a permit measuring grazing privileges in terms of "animal unit months" (AUMs), . . . valid for up to 10 years and usually renewed, as suggested by the Act. See 43 U. S. C. § 315b; Public Land Law Review Commission, *One Third of the Nation's Land* 109 (1970). But the conditions placed on permits reflected the leasehold nature of grazing privileges, consistent with the fact that **Congress had made the Secretary the landlord of the public range and basically made the grant of grazing privileges discretionary. The grazing regulations in effect from 1938 to the present day made clear that the Department retained the power to modify, fail to renew, or cancel a permit or lease for various reasons.**
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> First, the Secretary could cancel permits if, for example, the permit holder persistently overgrazed the public lands, lost control of the base property, failed to use the permit, or failed to comply with the Range Code. [citations omitted] Second, the **Secretary, consistent first with 43 U. S. C. § 315f, and later the land use planning mandated by [FLPMA,] 43 U. S. C. § 1712, was authorized to reclassify and withdraw land from grazing altogether and devote it to a more valuable or suitable use.** [citations omitted] Third, in the event of range depletion, the Secretary maintained a separate authority, not to take areas of land out of grazing use altogether as above, but to reduce the amount of grazing allowed on that land, by suspending AUMs of grazing privileges "in whole or in part," and "for such time as necessary." [citations omitted]

[A]ctive grazing on the public range declined dramatically and steadily (from about 18 million to about 10 million AUMs between 1953 and 1998). . . . [Nevertheless,] the range remained in what many considered an unsatisfactory condition.

[I]n 1976, Congress enacted a new law, [FLPMA, citation omitted] which instructed the Interior Department to develop districtwide land use plans based upon concepts of "multiple use" (use for various purposes, such as recreation, range, timber, minerals, watershed, wildlife and fish, and natural and scenic, scientific, and historical usage), § 1702(c), and "sustained yield" (regular renewable resource output maintained in perpetuity), § 1702(h). **The FLPMA strengthened the Department's existing authority to remove or add land from grazing use, allowing such modification pursuant to a land use plan, §§ 1712, 1714, while specifying that existing grazing permit holders would retain a "first priority" for renewal so long as the land use plan continued to make land "available for domestic livestock grazing," § 1752(c).**

As this passage makes clear, Congress has long recognized that public lands can have many different uses and serve many different values besides furnishing forage for cattle and sheep. The TGA, for example, calls for public lands in grazing districts to remain open to access by others "for all proper and lawful purposes." 43 U.S.C. § 315e. These could include everything from recreation to locating claims under the Mining Law. The TGA also explicitly prohibits holders of grazing permits from interfering with "hunting or fishing within a grazing district" being carried out in accordance with federal or state law. 43 U.S.C. § 315.

Contrary to the Memo's assertion, Congress did not make livestock grazing a preferred, priority use among FLPMA's "multiple uses." FLPMA's definition of "multiple use" explicitly provides that "range" or livestock grazing is just one of many uses and values to be served by the public lands, along with such things as "wildlife" and "natural scenic, scientific and historical values." 43 U.S.C. § 1702(c).

FLPMA's definition of "multiple use" also makes clear that "the use of some land for less than all of the resources" is permissible, that "periodic adjustments in use to conform to changing needs and conditions" is permissible, that the various resources should be managed "without permanent impairment of the productivity of the land and the quality of the environment," and finally, that while consideration should be given to "relative values of the resources," the BLM is not required to select a "combination of uses that will give the greatest economic return or the greatest unit output." *Ibid.*

As the Supreme Court put it, FLPMA "strengthened" the Interior Department's authority to, among other things, "remove" land from grazing use. Specifically, 43 U.S.C. § 1912(e) authorizes the Secretary to "issue management decisions to implement [FLPMA] land use plans," and these management decisions may make "exclusions (that is, total elimination) of one or more of the principal or major uses," of those lands. FLPMA defines "principal or major uses" to include "domestic livestock grazing" as well as "fish and wildlife development and utilization, mineral exploration and production, rights-of-way, outdoor recreation, and timber production." 43 U.S.C. § 1702(l).

FLPMA puts only two limitations on such "exclusion" decisions. First, they "shall remain subject to reconsideration, modification, and termination through revision . . . of the land use plan involved." 43 U.S.C. § 1912(e)(1). Second, any such management decision that "excludes (that is, totally eliminates) one or more of the principal or major uses for two or more years with respect to a tract of land of one hundred thousand acres or more" shall be reported to the Congress. 43 U.S.C. § 1912(e)(2).[2]

In PRIA, a law enacted two years after FLPMA, Congress explicitly acknowledged that not only FLPMA's land use planning process, but also the Interior Secretary independent of that process, may "determine[] . . . that grazing uses should be **discontinued (either temporarily or permanently) on certain lands."** 43 U.S.C. § 1903(b) (emphasis added). PRIA's confirmation that grazing uses may be "discontinued" did not draw any distinction between lands inside and outside of grazing districts. (Grazing districts are discussed in the next section, below.) This part of PRIA then underscored that, if grazing uses are continued on tracts of public lands, the goal of managing them "shall be to improve the range conditions . . . so that they become as productive as feasible in accordance with the rangeland management objectives established through [FLPMA's] land use planning process, and consistent with the values and objectives" Congress identified in PRIA. Those values and objectives include, besides livestock production, "wildlife habitat, recreation, forage, and water and soil conservation," 43 U.S.C. § 1901(a)(1), and "the value of such lands for recreational and esthetic purposes." 43 U.S.C. § 1901(a)(3).

II. The "chiefly valuable for grazing" classification in the TGA has never been determined to be an obstacle to the BLM retiring livestock grazing from lands within grazing districts.

The TGA authorized the Interior Secretary to establish "grazing districts" on unreserved public land thought to be "chiefly valuable for grazing and raising forage crops." 43 U.S.C. § 315. But the TGA also made clear that the legal effect of establishing a grazing district is quite limited. Most important, nothing in the TGA says or even hints that all lands in a grazing district are to be grazed; instead, it merely "authorizes"—not "requires"—the Secretary to issue livestock grazing permits inside grazing districts. 43 U.S.C. § 315b. The same section makes clear that "the creation of a grazing district . . . shall not create any right, title, interest, or estate in or to the [public] lands."

The relative legal insignificance of the "grazing district" concept can be shown by comparing it to another part of the TGA, section 15, which authorizes the Secretary to issue "leases" rather than "permits" in order to allow and regulate grazing on public lands outside of grazing districts. 43 U.S.C. § 315m. There are only two practical differences between grazing permits issued for lands inside of grazing districts and grazing leases issued for public lands outside of grazing districts, and both are relatively insignificant. One has to do with exactly who is entitled to priority to obtain such permits or leases. Compare 43 U.S.C. § 315b (criteria for preference in grazing districts) with § 315m (criteria for preference outside of grazing districts).[3] The other has to do with how revenues from grazing fees are shared. For both permits and leases, half of the revenue go into a separate Treasury account that is used for "range land betterment."[4] For permits in grazing districts, three-quarters of the remainder goes into the U.S. Treasury and the other quarter is sent to the pertinent state. 43 U.S.C. § 315i. For grazing leases outside of districts, all the other remaining funds are distributed to the state. See 2003 Solicitor's Opinion, discussed further below, and reproduced in Memo, Appendix E, p. 4, footnote 17.

The Memo tries to make much of an earlier decision in the *Public Lands Council* litigation where a federal court of appeals struck down a BLM regulation adopted in 1995 that authorized the Interior Secretary to issue grazing permits or leases for "livestock grazing, suspended use, and conservation use," 43 C.F.R. § 4130.2(a) (1995), and defined "conservation use" as "an activity, **excluding livestock grazing**, on all or a portion of an allotment" for conservation purposes. 43 C.F.R. § 4100.0-5 (1995) (emphasis added). APR does not, however, seek to suspend or exclude grazing under its permits.

The court of appeals construed that regulation as allowing grazing permits to be issued to an "individual or group who will not graze livestock for the entire duration of a permit." *Public Lands Council v. Babbitt,* 167 F.3d 1287, 1290 (10th Cir. 1999). The 1995 regulation in question did not address substituting one species of foraging animal for another, as APR's application seeks to do, and the court did not address any issues regarding such a change in permitted grazing use.

The court of appeals concluded that the applicable law, and particularly the TGA and FLPMA, "each unambiguously reflect Congress's intent that the Secretary's authority to issue 'grazing permits' be limited to permits issued 'for the purpose of grazing domestic livestock.' None of these statutes authorizes permits intended exclusively for 'conservation use.' The Secretary's assertion that 'grazing permits' for use of land in 'grazing districts' need not involve an intent to graze is simply untenable." 167 F. 3d at 1308.

The court of appeals went on to suggest that once the Secretary established a grazing district under the TGA, the "primary use of that land should be grazing," which created a "presumption" that district lands should be grazed, so that if Interior had issued a permit to graze particular lands in a grazing district, those lands must be grazed unless "range conditions are such that reductions in grazing are necessary," in which case "temporary non-use is appropriate." *Ibid.* Because the Interior Department did not appeal this part of the decision, the Supreme Court never addressed the legality of the 1995 regulation or this part of the court of appeals' decision.

As the court of appeals itself noted, the question before it was "not whether the Secretary possesses general authority to take conservation measures—which clearly he does—but rather, whether he has authority to take the specific measure in question, i.e., issuing a 'grazing permit' that excludes livestock grazing for the entire term of the permit." 167 F. 3d at 1307. It also noted that all parties to the litigation, including rancher organizations, agreed that "resting land is a perfectly acceptable practice on the public range and is done with regularity in order to prevent permanent destruction of the lands." *Ibid.*

The court of appeals also made clear that its decision does not meaningfully limit the Interior Department's broad authority over activities in grazing districts:

> If range conditions indicate that some land needs to be rested, the Secretary may place that land in non-use on a temporary basis, in accordance with Congress's grants of authority that the Secretary manage the public lands "in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, [and other] values," 43 U.S.C. § 1701(a)(8), or he may reduce grazing on that land, see 43 C.F.R. § 4110.3-2 (1994) (providing that active use may be temporarily suspended in whole or in part for various reasons); *id*. § 4110.3-3 (describing procedures for implementing changes in active use). The Secretary may also employ other means to ensure that the resources of the public range are preserved. See, e.g., 43 U.S.C. § 1752(d) (stating that grazing permits may incorporate an allotment management plan); *id.* § 1702(k) (defining allotment management plan as a document which "prescribes the manner in, and extent to, which livestock operations will be conducted in order to meet the multiple-use, sustained-yield, and other needs and objectives" of the land).

> In short, it is true that the TGA, FLPMA, and PRIA, give the Secretary very broad authority to manage the public lands, including the authority to ensure that range resources are preserved. Permissible ends such as conservation, however, do not justify unauthorized means. We hold that the Secretary lacks the statutory authority to issue grazing permits intended exclusively for conservation use."

167 F. 3d at 1308. It concluded its opinion with this summary statement:

> An examination of the statutes Congress has enacted to guide administration of the range land at issue in this case makes it abundantly clear that Congress intended the federal lands to be managed in such a way as to maximize their use for many purposes. There can be no doubt that Congress has vested the Secretary of the Interior with broad authority to decide entitlement to the grazing rights on the range as long as he does not exercise it contrary to clear Congressional mandates.

167 F 3d at 1309.

The Memo also tries to make much of two Interior Solicitor's Opinions that addressed the meaning and operation of the "chiefly valuable for grazing" language in the TGA (attached to the Memo as Appendices D and E). The first of these, issued in 2002, sought to clarify an earlier Solicitor's Opinion, issued in 2001, that addressed the BLM's authority to "retire" grazing on particular public lands in order to serve other values. The Solicitor partially reversed this 2002 Opinion in a new Opinion handed down the following year.

The 2001 Opinion concluded that the BLM could retire the lands from grazing through its land use planning process under FLPMA. It made no distinction between lands inside or outside of grazing district, and thus did not address whether retiring lands inside of grazing districts had to be accompanied by a decision that those lands were no longer "chiefly valuable for grazing."

The 2002 Opinion concluded that public lands inside of grazing districts could be retired from grazing **only** after a "proper finding that lands are no longer chiefly valuable for grazing." Memo, Appendix D, p. 2.

The 2003 Opinion, which purported simply to "clarify" the 2002 opinion, actually substantially reversed its principal holding, because it concluded that a "chiefly-valuable-for-grazing" determination is required "**only** when the Secretary is considering creating or changing grazing districts [sic] boundaries." Memo, Appendix E, p. 1 (emphasis added). It went on to acknowledge that "[l]and restoration achieved by temporary non-grazing may be authorized through land use planning and does **not** require reconsidering a chiefly-valuable-for-grazing determination." Id. p. 5 (emphasis added). It also acknowledged that "since the passage of FLPMA and its land use planning requirements, section 7 ['chiefly valuable'] classifications rarely occur in today's federal land management."

The 2003 Opinion therefore left the Secretary free to retire public land inside a grazing district from grazing without making a formal determination whether the land is "chiefly valuable for grazing," so long as the grazing district's boundaries remain unchanged. Thus, it simply confirmed the BLM's longstanding practice under the TGA of not bothering to adjust grazing district boundaries whenever it decided to retire land inside district boundaries from grazing. The reason to leave district boundaries unaltered is that, as explained above, there is little practical difference under the TGA between regulating grazing inside and outside grazing districts.

In sum, the 2003 Opinion reconfirmed that the Secretary "has discretion under FLPMA to use the land use planning process to cancel a permit, change grazing use distributions, or to devote the land to another public purpose or disposal," if that accords with the BLM's land use plan for that area. Memo, Appendix E, p. 5. Thus, all three of these Solicitor's Opinions (2001, 2002, and 2003) agreed that the BLM had ample legal authority to retire livestock grazing on tracts of public lands. The only issue the Solicitor addressed in them was the process by which the BLM (or the Secretary) could make such decisions.

III. The BLM Has Ample Legal Authority to Issue Bison Grazing Permits, and Approve Changes of Use from Cattle to Bison, and It Has Often Done So.

In APR's currently-pending application before the BLM, it is not proposing to retire its grazing permits or halt or suspend its use of the public lands for grazing purposes. Instead, it has requested a change of use to substitute one form of grazing (bison) for another (cows). Granting APR's change of use request is fully consistent with federal law and regulations and the applicable land use plan for the relevant allotments.

The Memo asserts that those who seek to graze bison on lands within grazing districts are not entitled to a "preference" for a grazing permit under the TGA, 43 U.S.C. § 315b. As support for this, it cites the preamble to the BLM's 2006 revised grazing regulations. Memo, p. 27, preamble attached as Appendix G. But, as the BLM specifically noted in that preamble, "**the kind of animal** an applicant for a permit or leases wishes to graze on public lands **has no bearing** on whether the applicant has or will be granted preference for a grazing permit or lease." 71 Fed. Reg. 39448 (2006) (emphasis added).

The BLM's grazing regulations, 43 C.F.R. § 4100.0-8, provide:

> The authorized officer shall manage livestock grazing on public lands under the principle of multiple use and sustained yield, and in accordance with applicable land use plans. Land use plans shall establish allowable resource uses (either singly or in combination), related levels of production or use to be maintained, areas of use, and resource condition goals and objectives to be obtained. The plans also set forth program constraints and general management practices needed to achieve management objectives. Livestock grazing activities and management actions approved by the authorized officer shall be in conformance with the land use plan.

Since the BLM's overhaul of grazing regulations in 1978, soon after FLPMA was enacted, they have expressly contemplated that permits and leases may authorize livestock grazing by privately-owned indigenous animals like the bison owned by APR. Specifically, the regulations provide that "[s]pecial grazing permits or leases authorizing grazing use by privately owned or controlled indigenous animals may be issued at the discretion of the authorized officer," 43 C.F.R. § 4130.6-4, and that grazing permits and leases may include terms and conditions specifying "the kinds of indigenous animals authorized to graze under specific terms and conditions."[5] As the BLM has explained: "The reference to indigenous animals in subpart 4100 of this title addresses only the issuance of special grazing permits or leases for privately owned or controlled indigenous animals and does not refer to those wildlife managed by State game and fish department or to endangered species for which the Department of the Interior has responsibility." 49 Fed. Reg. 6442 (Feb. 21, 1984).

The allotments for which APR seeks a change of use are within the planning area of the BLM's HiLine Resource Management Plan (RMP). APR's proposal is consistent with that plan. Indeed, that plan, last revised in 2016, specifically addresses grazing permits for bison and applications for changes of use like that submitted by APR. The RMP includes three relevant provisions:

- "deviations from the terms and conditions of [] grazing permit should be applied for beforehand and will require environmental review," HiLine RMP at 3-25;

- adjustments may be made for purposes of sage grouse conservation to the "type of livestock (e.g., cattle, sheep, horses, bison, llamas, alpacas and goats)," *id*. at 3-26;

- the BLM may prioritize modifications of grazing permits if there is "a request from the permittee to modify the terms and conditions," *id*. at 3-27.

The final environmental impact statement (FEIS) that accompanied that plan provides additional detail:

> Bison in private ownership are considered livestock, and as such can be permitted by the BLM (43 CFR 4130.3-2(e)). The primary test in making this distinction is whether or not the owner of the animals qualifies as an applicant under the requirements of the grazing regulations. The grazing regulations define qualified applicants and apply equally to all qualified applicants, regardless of the class of livestock.
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> Privately owned bison may be authorized to graze under the regulations provided it is consistent with multiple use-sustained yield objectives. No scientifically and/or resource management-based reason has been identified for why bison should not be permitted to graze BLM land. At the present time, there are no conflicts identified with other resource objectives if bison were permitted to graze. Implementation of a no bison grazing alternative is not considered reasonable or necessary.
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> As with other classes of livestock, bison grazing may not be permitted where environmental review indicates conflict with resource objectives and attainment of Standards for Rangeland Health.

HiLine FEIS at 172 (2015).[6] Other relevant passages of the FEIS include:

- "Livestock grazing can include the grazing of cattle, sheep, horses, goats, and bison." *Id*. at 346.

- "The grazing regulations provide for authorizing grazing permits for privately owned indigenous animals. The BLM has permitted two allotments in south Phillips County for bison. The BLM has also permitted bison on allotments in other areas of Montana, Colorado, New Mexico, North Dakota, South Dakota, and Wyoming. Any future proposals to change the class of livestock from cattle to bison would be considered as provided by the grazing regulations." *Id*. at 13.

- "A distinction is made between bison that are privately owned and considered livestock and those that are considered wildlife (publicly owned) that fall under the jurisdiction of the State of Montana." *Id*. at 13.

The HiLine RMP and FEIS were the product of an inclusive process with significant involvement from the state of Montana, local governments, and grazing interests. Cooperating agencies in the environmental review process included three counties and eight cooperative state grazing districts. HiLine FEIS at 793. From the outset, the BLM identified that it had "permitted two allotments in south Phillips County for bison" and explained that "[a]ny future proposals to change the class of livestock from cattle to bison would be considered as provided by the grazing regulations." HiLine Draft EIS at 11 (2013).

After releasing the draft RMP and EIS, the BLM held five public meetings and received and responded to 2,438 letters and emails, from which it identified over 1,000 specific substantive comments. HiLine FEIS at 804-05. A number of comments addressed the possibility of reintroducing wild bison within the planning area in coordination with the Montana Department of Fish, Wildlife and Parks. *See id*. at 812-1123.

No written comments objected to or raised concerns about the use of grazing permits for privately owned bison or the RMP providing that such grazing could be authorized through change of use requests. The BLM also received no formal protest of the RMP raising this issue, notwithstanding the fact that a protest was filed related to the RMP's potential impact on grazing. See BLM Director's Protest Resolution Report, HiLine RMP at 61-62 (2015).

This history demonstrates that the BLM has extensively and publicly vetted its administration of grazing permits for bison in the HiLine planning area and has previously authorized change in use applications like APR's.

The Memo (p. 26) asserts that pertinent law requires the BLM's decision-making to be consistent with "county land use plans." This is wrong. FLPMA encourages the BLM to coordinate its management with programs of other federal, state, local and tribal government agencies, and to consider relevant portions of those non-BLM plans, but FLPMA does not require absolute consistency. See 43 U.S.C. § 1712(c)(9) (coordination required "to the extent consistent with" federal law, and "to the extent practical").

Grazing on the public lands has long involved species of animals besides cattle and sheep, such as goats, horses and burros. Neither the TGA nor FLPMA restricts the BLM's authority to issue grazing permits and leases to specific species. Rather, they leave such questions to the BLM's discretion. FLPMA in particular recognizes that, as conditions and society's values evolve, the BLM's management of the public lands may take into account changing social needs and conditions.

The BLM's practice of issuing permits for grazing public lands by privately-owned bison extends back several decades. Its 1984 Manual on Grazing noted that "permits or leases authorizing grazing use by privately owned or controlled indigenous animals (including buffalo) may be issued at the discretion of the authorized officer." In 2015, the BLM's RMP for the South Dakota planning area identified ten grazing allotments with leases or permits for bison, three of which also had leases or permits for cattle. See South Dakota RMP at Appendix M (2015). Within the HiLine RMP, bison have become the second most common type of livestock: An average of 370,101 AUM of cattle, 1,033 AUM of bison, 686 AUM of horses, and 155 AUM of sheep were authorized to graze in the planning area between 2008 and 2012. HiLine FEIS at 310.

The BLM has generally authorized bison grazing through change of use requests like that submitted by APR. That appears to be what occurred in 1998 when the Dillon Field Office authorized bison grazing for the Roe #20727 allotment.[7]

Contrary to the Memo's contention, the BLM does not need to make any kind of formal determination that bison grazing is consistent with multiple use management, (or, for that matter, consistent with other livestock grazing), before approving a change in use such as APR proposes. That decision is governed by the principles set forth in FLPMA, including its broad definition of multiple use, the pertinent resource management plan, and other applicable laws and regulations. See Iriart v. BLM, 126 IBLA 111 (1993) (upholding the BLM's decision to deny request for change of use from cattle to sheep due to concerns about impact to bighorn sheep).

That is exactly how the BLM has responded to requests to authorize bison grazing. For example:

- The 2014 decision authorizing APR to change the season of use for its permits for the Telegraph Creek Allotment and Box Elder Allotment considered whether wildlife would be harmed by the proposal. The BLM partially based its decision to grant the request on its conclusion that no such harm would occur. Notice of Proposed Decision (February 3, 2014).

- The 2008 decision authorizing APR to change the type of livestock from cattle to bison for a lease for the Box Elder Allotment considered whether other uses would be impaired. The decision found no such impairment because "the public lands in this Allotment will continue to be open to the same activities." However, the decision denied the portion of the request that had sought to shift to year-round grazing because of potential "[c]onflicts with designated big game winter range for elk, mule deer, and pronghorn antelope." Notice of Proposed Decision/Final Decision (May 19, 2008).[8]

The BLM's practice of authorizing bison grazing is fully consistent with Montana's grazing law. Montana law defines "livestock" to include "bison," Montana Code Annotated, Title 81, Livestock, § 81-2-702(5), and, indeed, APR has leases issued by the state to graze its bison on state-owned lands. Other states in the West treat privately-owned bison similarly. See, e.g., Idaho Statutes § 25-3301; New Mexico Statutes § 77-1B-2; North Dakota Century Code §§ 36-14-00.1, 36-11-01.1; South Dakota Codified Laws § 39-05-6; Wyoming Statutes § 11-6-302. The BLM's authorization of bison grazing is, therefore, in line with Montana's approach to grazing, not inconsistent with it.

Finally, in this connection, it is worth noting that the arguments put forth in Memo essentially seek to undermine APR's grazing privileges as recognized by the TGA. APR holds base property and qualifies for a preference under 43 U.S.C. § 315b. It seeks an adjustment in its grazing permits, just as others who hold TGA permits may seek to adjust type of livestock, seasons of use, or terms and conditions to better serve their private purposes. While neither APR nor any lease or permit holder has a right to insist upon such a modification, APR is entitled to the same consideration as any other permit holder seeking adjustment. It is, in short, the Memo, not APR, that seeks to create new restrictions on grazing permits and on the BLM's authority to adjust them in light of changing needs and circumstances.

IV. The Federal Power Act and a 2001 Solicitor's Opinion Construing It Lend No Support to the Memo's Argument.

The Memo cites, as support for its argument, a 2001 Solicitor's Opinion concluding that public lands subject to the TGA are "reservations" for purposes of the Federal Power Act of 1920 (FPA).[9] This conclusion has absolutely no bearing whatsoever on APR's change of use application. As the Solicitor's Opinion explains, "[b]ecause the term 'reservation' is, as the Supreme Court has noted, 'artificially' defined in the FPA to carry out the specific purposes of section 4(e), my conclusion is limited to that context." Opinion at 4 (*quoting FPC v. Tuscarora Indian Nation,* 362 U.S. 99, 111 (1960)).

The only effect of having "Reservation" status under the FPA is that it allows the Interior Department to formulate conditions that it deems "necessary for the adequate protection and utilization of" those lands, which the Federal Energy Regulatory Commission must then incorporate in any license it issues for hydropower projects that involve these lands. 16 U.S.C. § 797(e). The lands involved in APR change-of-use application involve no hydropower licensing process. This Solicitor's Opinion is, then, utterly irrelevant to the matter at hand.

V. Bison Grazing on the CMR National Wildlife Refuge

The Memo advances arguments about the legal standards governing the FWS's management of grazing on lands within the Refuge, essentially maintaining that they make grazing by cattle and sheep a dominant use. In doing so, it attempts to resuscitate an old, discredited argument that the TGA governs grazing within the Refuge because Refuge lands fall within grazing districts. Therefore, it argues, the Refuge must be managed according to the purposes of the TGA. Memo, pp. 28-29.

This simply misstates the law. The Refuge was originally established in 1936 as the Fort Peck Game Reserve by Executive Order 7509 (EO 7509). That Order directed joint administration of the Range by the BLM and the FWS,[10] providing that:

> natural forage resources . . . shall be first utilized for the purpose of sustaining in a healthy condition a maximum of four hundred thousand (400,000) sharptail grouse, and one thousand five hundred (1,500) antelope, the primary species, and such nonpredatory secondary species in such numbers as may be necessary to maintain a balanced wildlife population. . . .

In 1976, Congress gave the FWS (now part of the Interior Department) sole authority to manage the Range and made it part of the National Wildlife Refuge System. 16 U.S.C. § 668dd(a)(1). Thereafter, some who held permits to graze livestock on the Range sued, arguing that the TGA continued to govern grazing within the Refuge. In *Schwenke v. Secretary of the Interior,* 720 F.2d 571, 578 (9th Cir. 1983), the Ninth Circuit ruled against them. It held that what Congress did in 1976 was to "change the statute under which the Range is to be administered from the Taylor Grazing Act to the National Wildlife Refuge System Administration Act." Thus, the TGA does not apply to lands within the Refuge and those lands are no longer a component of TGA grazing districts.

The Memo also argues that the 2003 Solicitor's Opinion, discussed earlier, also restricts the FWS. That earlier discussion demonstrates that the 2003 Opinion does not, in fact, restrict the BLM in the manner envisioned by the Memo. Moreover, because the Opinion applies only to the BLM's administration of grazing districts under the TGA, it has no bearing on FWS management of the Refuge under the statutes it administers.

While the TGA does not apply, grazing remains a secondary purpose of the Refuge under EO 7509. The court in *Schwenke* held that once the FWS has provided for the population targets of primary species and ensured "a balanced wildlife population," then "grazing and wildlife preservation have equal status" in managing any remaining forage. 720 F.2d at 575. This does not mean that the FWS must authorize grazing in any particular manner or with respect to any particular lands within the Refuge. As the Montana District Court explained in *Silver Dollar Grazing Association v. U.S. Fish & Wildlife Service,* the Service has "broad discretion" to "manage the land to protect wildlife." No. CV 06-02-GF-SHE (June 1, 2007) (unpublished), *aff'd*, No. 07-35612 (Jan. 13, 2009) (unpublished).

FWS most recently set management direction for the Refuge in its 2012 Conservation Plan. The Plan's executive summary explains that the FWS "will adopt an active approach to using livestock grazing as a management tool by shifting from traditional annually permitted grazing to a prescriptive grazing regime for enhancement of wildlife habitats." Comprehensive Conservation Plan for the Charles M. Russell National Wildlife Refuge & UL Bend National Wildlife Refuge at XIV (2012) (Refuge CCP).

This process for managing grazing differs from how the BLM manages grazing on public lands, because the FWS administers grazing under different legal authority from the TGA. For that reason, the objections raised in the Memo to the use of prescriptive grazing, limitations on permit transfer, and consideration of revenue sharing, Memo, pp 29-30, are groundless, because they rely upon the provisions of the TGA. Thus, for example, the Conservation Plan explains that "[u]nlike other public lands, such as BLM lands, the [National Wildlife Refuge System] Improvement Act does not provide for transfer of grazing permits." Refuge CCP at 18.

REFERENCES

[1] Commissioned from Stillwater Technical Solutions, April 22, 2020, by the Montana Natural Resource Coalition.

[2] That subsection goes on to authorize Congress, after receiving notice of such a decision, to negate it by concurrent resolution within ninety days. But because the president has no power to veto concurrent resolutions, the veto power Congress reserved to itself is almost certainly unconstitutional and unenforceable under the Supreme Court's 1983 decision in *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983). See *National Mining Association v. Zinke*, 877 F.3d 845 (9th Cir. 2017), cert. denied, 139 S. Ct. 309 (2018).

[3] The differences are not substantial. In general, 43 U.S.C. §315b gives preference to "those within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights," while 43 U.S.C. §315m gives preference to "owners, homesteaders, lessees, or other lawful occupants of contiguous lands."

[4] Congress has made clear that "range land betterment" funds may be spent on "fish and wildlife enhancement" as well on things like reseeding and fence construction. 43 U.S.C. § 1751(b)(1).

[5] These sections have been renumbered since 1978, with minor adjustments in the language, but the substance remains the same. See 43 Fed. Reg. 29,058, 29,070-29,073 (July 5, 1978). Several of the BLM's RMPs acknowledge that it could issue permits and leases to authorize grazing by other species of livestock like llamas and alpacas. See, e.g., Roan Plateau RMP at 2-30 (2016); HiLine RMP at 3-26 (2015); Wyoming RMP Amendment for Greater Sage-Grouse at 45 (2015).

[6] This passage in the HiLine RMP reflects the BLM's consistent view of the grazing regulations. That view was reiterated in the recent approval of the Lewistown RMP, which explains that "[p]rivately owned bison are considered livestock and, as such can be permitted by the BLM." Record of Decision for the Lewistown RMP I-8 (2020). The courts routinely give significant deference to an agency's interpretation of its own regulations. See Kisor v. Wilkie, 139 S. Ct. 2400, 2408 (2019).

[7] Earlier this year the BLM issued a proposed decision to change the use back to cattle at the request of the permit holder. *See* Roe Change in Kind Proposed Decision (Feb. 24, 2020). Approving a change in species of animal that can be grazed is hardly unknown. *See, e.g., Badger Ranch, et al., v. BLM*, 171 IBLA 285, 286-87 (2007) (sheep to cattle).

[8] The Memo attempts to argue that APR's application for a change of use is not really a proposal to graze, but rather a proposal to "rewild" the public lands in this area. In fact, the BLM has taken care in issuing grazing permits for bison to include conditions that make it plain the bison are livestock. These conditions have incorporated Montana regulations for marking, tagging, and disease testing, and have required APR—like any public land grazer—to comply with standards of rangeland health and maintain records of actual use.

[9] The Opinion reproduced in Appendix F of the Memo.

[10] In 1936, the FWS was part of the Department of Agriculture. Hence, EO 7509 required joint administration by the Secretary of the Interior and the Secretary of Agriculture. See Schwenke v. Secretary of the Interior, 720 F.2d 571, 573 n.2 (1983)).

APPENDIX – BIOGRAPHIES OF LESHY AND PIDOT

John Leshy, Emeritus Professor, University of California, Hastings College of the Law, was the Solicitor (General Counsel) of the Department of the Interior from 1993-2001, and the Department's Associate Solicitor for Energy & Resources from 1977-1980. He has taught and written about public lands for nearly a half-century, including co-authoring the standard law text on public land law, *Federal Public Land and Resources Law*, now in its 7th edition. At Hastings since 2001, he previously was a law professor at Arizona State University (1980-1992), followed by several months as special counsel to the Chair of the Natural Resources Committee of the U.S. House of Representatives. Earlier, he was an attorney-advocate with the Natural Resources Defense Council (NRDC) and a litigator with the U.S. Department of Justice. Several times he has taught public land law as a visiting professor at Harvard Law School, from which he graduated after earning an A.B. at Harvard College.

Justin Pidot, Professor of Law & Co-Director of the Environmental Law Program, University of Arizona James E. Rogers College of Law, was the Deputy Solicitor for Land Resources of the Department of the Interior from 2016-17, and a lawyer at the U.S. Department of Justice, Environment & Natural Resources Division, Appellate Section from 2008-2011. He has presented oral argument in more than a dozen cases in federal appellate and district courts. His teaching and scholarship focus on public lands and natural resources, environmental law, and administrative law. He previously served as a professor at the University of Denver Sturm College of Law and a visiting professor at the University of Colorado Law School. He clerked for the Honorable Judith W. Rogers of the U.S. Court of Appeals for the D.C. Circuit, and completed a fellowship at the Georgetown Environmental Law and Policy Institute. He received his J.D. with distinction from Stanford Law School, where he was Co-Editor-In-Chief or the Stanford Environmental Law Journal, and his B.A. with high honors from Wesleyan University.

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