

# PUBLIC RANGELAND REFORM: NEW PROSPECTS FOR COLLABORATION AND LOCAL CONTROL USING THE RESOURCE ADVISORY COUNCILS

TODD M. OLINGER

*We can almost say that everything that was then is not now,  
and everything that was not then now is.*

—William Manchester<sup>1</sup>

## INTRODUCTION

Amidst booming population growth and a social and economic transformation that has led some to herald the coming of the “New West,” the arid rural lands beyond the 100th meridian of the United States continue to be home to the Old West. Possibly no more enduring symbol of the Old West remains than the ranchers who have worked on the range for well over a century. For many, these men and women are stewards of the land on which they operate, a well-spring of the West’s core values, and the last barrier to the suburbs, strip malls, and condominiums that are rapidly spreading across the western range. To others, the ranchers are “welfare cowboys,” surviving on public subsidy and decimating grassland and riparian ecosystems with overgrazing; a numerically small but politically formidable interest group that is “hell-bent on destroying the West.”<sup>2</sup>

As might be expected, the disputes between environmentalists and ranchers are often heated. For example, in 1994, a federal wildlife biologist met with ranchers in New Mexico to discuss grazing cutbacks necessary for the protection of an endangered species.<sup>3</sup> After the meeting, an anonymous rancher told the biologist, “If you ever come down to Catron County again, we’ll blow your . . . head off.”<sup>4</sup> Catron County also passed ordinances mak-

---

1. SHERM EWING, *THE RANCH: A MODERN HISTORY OF THE NORTH AMERICAN CATTLE INDUSTRY* 4 (1995).

2. BERNARD DEVOTO, *THE EASY CHAIR* 254 (1955).

3. See Charles McCoy, *U.S. Agency’s Plan to Trim Grazing Rights Sparks Laws—and Lawlessness*, WALL ST. J., Jan. 3, 1995, at A1.

4. *Id.*

ing it illegal for the Forest Service to regulate grazing on Forest Service lands, and the county sheriff threatened to arrest the head of the local Forest Service office for violating the ordinances, prompting a U.S. attorney to threaten to arrest the sheriff.<sup>5</sup>

Threats became violence in the early morning of October 31, 1993, when someone tossed a bomb onto a Bureau of Land Management building in Reno, Nevada, blowing a three-foot hole in the roof and causing \$100,000 in damage.<sup>6</sup> Fortunately, no one was injured.<sup>7</sup> A note from the perpetrators was signed the "Tom Horn Society," apparently in reference to a nineteenth-century gunman hired by western ranchers to scare away settlers and kill rustlers.<sup>8</sup>

Some environmentalists have been equally emphatic, albeit less violent, in their approach toward range ecosystem protection. A prominent environmental advocate in this field, George Wuerthner, claims that grazing is incompatible with adequate protection of western ecosystems.<sup>9</sup> Wuerthner argues that overgrazing has caused a systematic depletion of native plant and animal species across the West, leading to ecosystem alterations that are less noticeable but similar in kind to the destruction caused by timber clear-cutting.<sup>10</sup> In a 1996 address, titled *Apocalypse Cow*, Wuerthner called for a complete removal of cattle from public lands in the West.<sup>11</sup>

In this polarized environment, compromise and collaboration have been uncommon, despite shared interests and values which suggest that less confrontational strategies might be beneficial to both sides. The past four years, however, have seen a shift in the pattern of confrontation over grazing on public lands with the

---

5. See *id.*; see also Tony Davis, *Catron County's Politics Heat Up as its Land Goes Bankrupt*, HIGH COUNTRY NEWS, June 24, 1996, at 1 (discussing Catron County ordinances that make it illegal for federal agencies to regulate public land without consultation with the county and that declare grazing on public lands to be a private property right); Robert Barrett, Comment, *History on an Equal Footing: Ownership of the Western Federal Lands*, 68 U. COLO. L. REV. 761, 762 (1997) (discussing recent ordinances passed by more than 100 western counties repudiating federal control of the public lands); Catron County, N.M., Ordinance 004-91 (May 21, 1991) (repealed by Catron County, N.M., Ordinance 003-92 (Oct. 6, 1992)).

6. See DAVID HELVARG, *THE WAR AGAINST THE GREENS* 422 (1994).

7. See *id.* at 422 n.9.

8. See *id.*

9. See George Wuerthner, *Apocalypse Cow*, Speech at the University of Colorado (Oct. 30, 1996) (audio tape on file with the author).

10. See *id.*

11. See *id.*

implementation of range management reform provisions under the Department of the Interior ("DOI"). The new regulations, which apply to 177 million acres of Bureau of Land Management ("BLM") lands in the western United States, are based on the premise that locally negotiated solutions are better than bureaucratic mandates and nationwide standards promulgated from Washington, D.C.<sup>12</sup>

The story of these regulations is instructive on many fronts. The current provisions of "Rangeland Reform '94" are the result of a remarkable collaborative field effort by the Secretary of the Interior, Bruce Babbitt, and a diverse citizen group called the Colorado Rangeland Reform Working Group.<sup>13</sup> Rangeland Reform '94 also represents one of the most hard-fought efforts to date to reform one of what Professor Charles Wilkinson has called the "lords of yesterday"—the laws and politics of land, water, and minerals that emerged from an earlier western era when the extraction of natural resources drove the growth of the West.<sup>14</sup> Finally, Rangeland Reform '94 may provide the first sketch of a process by which complex and deeply conflicting public interests may be incorporated into meaningful land management reform. This comment discusses the history of the land, laws, and politics which led up to Rangeland Reform '94, the collaborative process and major compromises that made range reform possible under Secretary Babbitt's leadership, and the advantages and weaknesses of DOI's new model of multiple-interest collaboration and local control. I conclude that the BLM's new approach to rangeland reform will ultimately be more productive than inflexible modes of confrontation in the courts and national-level debates over intrinsically local problems in the House and Senate.

## I. RANCHERS AND THE RANGE IN THE "NEW WEST"

### A. *Range Utilization*

While the public range is vast, relatively few ranchers enjoy its benefits. Approximately 3% of the ranchers in the United States graze cattle on public lands for all or part of their ranching

---

12. See *infra* Part III.

13. See *infra* Part III.

14. CHARLES WILKINSON, CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST 17 (1992).

operation.<sup>15</sup> However, the federal lands utilized by this small percentage of ranchers represent an area larger than California, Oregon, and Washington combined,<sup>16</sup> or 41% of the entire western United States.<sup>17</sup> On DOI's Bureau of Land Management lands specifically, grazing is authorized on about 90% of the 177 million acres in the western United States.<sup>18</sup> Approximately 17,800 grazing permittees, primarily in sixteen western states, operate on BLM lands.<sup>19</sup> Additionally, grazing is authorized on about 60%, or about 85 million acres, of the 144 million acres of National Forest lands in the lower forty-eight states.<sup>20</sup>

Despite the extensive public lands dedicated to grazing, grasses on federal lands provide only 2% of the feed consumed by beef cattle in the United States.<sup>21</sup> The explanation for this disparity lies in the relative scarcity of feed on the western lands. Whereas in the eastern United States a single acre may produce enough feed to support a cow for a year, it takes an average of one hundred acres to accomplish the same task in some parts of the

---

15. See Joseph M. Feller, *Til the Cows Come Home: The Fatal Flaw in the Clinton Administration's Public Lands Grazing Policy*, 25 ENVTL. L. 703, 704 (1995).

16. See William Riebsame, *Ending the Range Wars?*, ENV'T, May 1996, at 4.

17. See Hannah Gosnell, *Rangeland Reform '94 and the Politics of the Old West: An Analysis of Institutional and Ideological Barriers to Reforming Federal Rangeland Policy* 12 (1995) (unpublished M.S. Thesis, University of Colorado) (on file with Norlin Library at the University of Colorado). Gosnell's work, submitted as a geography master's thesis at the University of Colorado, provides an insightful analysis of the geographical, historical, and social context of Rangeland Reform '94 through the end of 1994 and explains the "devolution of Rangeland Reform '94" in terms of decisions made by key actors, and institutional and ideological barriers to reform. *Id.* at 61. Gosnell's thesis provided an important foundation and analytical framework for this comment's analysis of the pre-1995 range reform issues leading to the implementation of the RACs, and I would like to recognize and thank Hannah in this regard.

18. See Feller, *supra* note 15, at 703.

19. See BUREAU OF LAND MANAGEMENT, UNITED STATES DEPARTMENT OF THE INTERIOR, *RANGELAND REFORM '94: A PROPOSAL TO IMPROVE MANAGEMENT OF RANGELAND ECOSYSTEMS AND THE ADMINISTRATION OF LIVESTOCK GRAZING ON PUBLIC LANDS* 3 (1993).

20. See BUREAU OF LAND MANAGEMENT, U.S. DEPT' OF THE INTERIOR, *RANGELAND REFORM '94 DRAFT ENVIRONMENTAL IMPACT STATEMENT* 3-5 (1994). Since DOI's final range reform regulations do not apply to the national forests under the Department of Agriculture, this comment does not specifically address the management of grazing in the national forests. It focuses solely on the Department of the Interior's management, through the BLM, of grazing on the public lands. In fact, by definition under FLPMA, the term "public lands" means any land owned by the United States and "administered by the Secretary of the Interior through the Bureau of Land Management . . ." 43 U.S.C. § 1702(e) (1994).

21. See Feller, *supra* note 15, at 704.

West.<sup>22</sup> As a result, although there are an estimated 120 million cattle in the United States, only about 1.5 million cattle graze on public land in the West.<sup>23</sup>

The feed potential of the public lands is measured in “animal unit months” (“AUMs”), with one AUM defined as the amount of feed required to sustain one cow, bull, steer, heifer, horse, burro, mule, five sheep, or five goats for one month.<sup>24</sup> Historically, grazing permits have been priced by the number of AUMs they allow, and the underpricing of permits has been an issue of great contention—among supporters and detractors of range reform.

### *B. Grazing Fees and the Economics of Public Grazing*

At the root of the grazing fee controversy is the perception that the federal government subsidizes public grazing through low fees. Since the federal government first began collecting grazing fees in 1936, the fees have consistently been substantially lower than comparable rates on private lands.<sup>25</sup> The Taylor Grazing Act of 1934<sup>26</sup> authorized the Secretary of the Interior to charge “reasonable fees.”<sup>27</sup> From 1936 until 1946, the charge was five cents per AUM, and by 1968 the charge had risen to thirty-three cents.<sup>28</sup>

The Federal Land Policy and Management Act of 1976<sup>29</sup> (“FLPMA”) contained a general statement that the United States should “receive fair market value of the use of the public lands

---

22. *See id.*

23. *See* Steve Johnson, *BLM's Grazing Program Is a National Scandal*, HIGH COUNTRY NEWS, Dec. 23, 1985, at 15.

24. *See* 43 C.F.R. §§ 4100.0-5, 4130.8-1 (1996). For permit fee purposes, section 4130.8-1 requires that the animal be over six months old when it enters the range, or over twelve months old if it is born on the range. Ferry Carpenter initially based the five-to-one ratio for sheep and cows on Forest Service assessments of the consumption of each type of animal, as well as a three-hundred-year-old set of regulations for grazing on the Boston Commons. *See* FERRY CARPENTER, *CONFESSIONS OF A MAVERICK* 159-60 (1984).

25. *See* JAMES MUHN & HANSON R. STUART, UNITED STATES DEPARTMENT OF THE INTERIOR, BUREAU OF LAND MANAGEMENT: OPPORTUNITY AND CHALLENGE—THE STORY OF THE BLM 47, 136 (1988); *see also* ROBERT L. GLICKSMAN & GEORGE CAMERON COGGINS, *MODERN PUBLIC LAND LAW IN A NUTSHELL* 209 (1995).

26. 48 Stat. 1269 (codified as amended in scattered sections of 43 U.S.C.). The Taylor Grazing Act is discussed in more detail in Part II.

27. 43 U.S.C. § 315b (1994).

28. *See* MUHN & STUART, *supra* note 25, at 81, 136.

29. Pub. L. No. 94-579, 90 Stat. 2744 (codified as amended in scattered sections of 43 U.S.C.).

and their resources unless otherwise provided for by statute.”<sup>30</sup> However, FLPMA placed a one-year moratorium on implementing this policy in the context of grazing fees, pending the results of a grazing fee study.<sup>31</sup> The study, finished in 1977, concluded that the grazing fee system should indeed collect fair market value.<sup>32</sup> Despite the recommendation of the 1977 study, in 1978 Congress adopted a new indexed fee formula which was based on the “economic value of the use of the land to the user”—or the price ranchers received for their cattle at market—rather than the market value of the grazing permit.<sup>33</sup> The new fee continued to operate very favorably for ranchers. In 1993, the year prior to Rangeland Reform ‘94, the federal fee was \$1.86 per AUM, while the average private fee for comparable lands across the West was \$9.80 per AUM.<sup>34</sup>

The 1978 formula remains in effect today despite several subsequent efforts by Congress to alter the grazing fee structure so that it would better reflect market value<sup>35</sup> and despite the fact that statutory authority for the economic value formula expired in 1985.<sup>36</sup> In January 1996, DOI lowered fees by 30% to \$1.35 per AUM, the lowest fee that can be calculated using the 1978 formula.<sup>37</sup> The effective subsidy<sup>38</sup> resulting from this fee was expected to be \$14 million in 1996, or an average of about \$787 per permittee.<sup>39</sup>

The level of subsidization below market value does not, however, fully reflect the poor economics of federal grazing

---

30. 43 U.S.C. § 1701(a)(9) (1994).

31. *See id.* § 1751(a).

32. *See* SECRETARY OF THE INTERIOR & SECRETARY OF AGRIC., U.S. DEP’T OF THE INTERIOR AND U.S. DEP’T OF AGRIC., STUDY OF FEES FOR GRAZING LIVESTOCK ON PUBLIC LANDS 6-1 (1977).

33. *See* 43 U.S.C. § 1905 (1994).

34. *See* 59 Fed. Reg. 14,315 (1994).

35. *See infra* notes 53-55 and accompanying text.

36. *See* 43 U.S.C. § 1905 (1994). The duration of the fee formula was extended indefinitely by an executive order of President Ronald Reagan. *See* Exec. Order No. 12,548, 3 C.F.R. 188 (1986).

37. *See Interior Department Cuts Its Grazing Fees by 30%*, WALL ST. J., Jan. 24, 1996, at A6.

38. This subsidy is not a direct government subsidy, in that it does not cost the federal government anything to provide. Rather, it reflects the difference between the market price of grazing rights in the West and the price of federal grazing permits. In this regard, the subsidy reflects the economic “opportunity cost” of not charging federal permittees the prevailing market rate. *See id.*

39. *See id.* The average subsidy per permittee is calculated by dividing \$14 million by the 17,800 BLM permittees. *See supra* note 19.

programs, because it does not account for the high costs the government incurs managing them. If the costs of administering grazing on BLM and Forest Service lands are considered, the grazing program actually costs the federal government more money to administer than it returns in permit revenue.<sup>40</sup> In 1994, for example, total line-item appropriations for public grazing were \$105 million, while the federal government collected only \$29 million in fees, yielding a deficit of \$76 million.<sup>41</sup> If grazing related appropriations such as soil, wildlife, and riparian area management are considered, the total annual cost of the grazing program to federal taxpayers approaches \$200 million.<sup>42</sup> All told, the federal government spends 10% to 20% more each year on managing the federal grazing programs than the 29,000 ranchers who use federal lands make in profits.<sup>43</sup> So the government could actually save money by paying ranchers not to graze.<sup>44</sup> In fact, six years of federal rangeland budgets is approximately equal to the current \$1.4 billion market value of all federal grazing permits, so conceivably over this time period the government could break even by buying every grazing permit at market rates.<sup>45</sup>

Ranchers counter that they are not the only interest group whose activities are subsidized on public lands; they point out, for instance, that most recreational users are subsidized as well.<sup>46</sup> Ranchers also argue that private grazing fees should not be compared to public fees, because the public lands are largely

---

40. See KARL HESS, JR. AND JERRY L. HOLECHEK, REFORMING PUBLIC LAND GRAZING 2 (1995). This subsidy is a true subsidy because the fees ranchers pay the federal government for permits to graze on federal lands are less than it costs the federal government to manage the grazing program.

41. See *id.*

42. See *id.* at 3.

43. See *id.*

44. See *id.*

45. See *id.*

46. See Peter Chilson, *The Land Is Still Public but It's No Longer Free*, HIGH COUNTRY NEWS, Oct. 13, 1997, at 1, 10 (noting that recreational subsidies are beginning to come under scrutiny as land managers search for funding in tight budgetary times). Although both ranching and recreation are clearly subsidized, the ranchers' comparison of the two lacks persuasion, even without comparing the relative national priorities of the two endeavors, because most recreational uses are nonconsumptive (albeit often environmentally damaging) and do not provide a monetary profit to users. Public land grazing, on the other hand, consumes a renewable public resource in order to provide a direct economic benefit to a small segment of the nation's population. As such, it seems that ranchers should be charged a fair price for the privilege of earning profits on the public lands.

unimproved and impose greater operational costs on ranchers than do private lands.<sup>47</sup> Finally, ranchers caution against measuring the effectiveness of government programs using a narrow cost-benefit analysis.<sup>48</sup> They point out external benefits to ranching, such as increasing the beef supply for consumers—thereby lowering prices—and providing economic benefits to rural communities.<sup>49</sup> Senator Ben Nighthorse Campbell (R-CO) argues that the federal grazing program is essential to protecting the “way of life” in rural western economies and that “every one dollar a rancher spends yields five dollars in economic activity throughout the West.”<sup>50</sup> One woolgrower opined that requiring the BLM to raise enough money through grazing fees to cover the management costs of the grazing program would be as senseless as requiring the state patrol to raise enough revenue through ticketing to cover its annual budget.<sup>51</sup>

Nonetheless, environmentalists have been quick to argue that since the grazing program does not cover its costs, it constitutes a subsidy. In this regard, they find themselves in the rare predicament of agreeing with conservative politicians and economists.<sup>52</sup> Hence, an alliance of various interest groups made a renewed effort in the 1990s to reform the grazing fee formula. The House passed a BLM authorization bill in 1991 that would have raised the grazing fee to \$8.70 per AUM.<sup>53</sup> However, the Senate, which has traditionally opposed legislation that could negatively impact western industries, did not pass the bill.<sup>54</sup> In the 1990s, four other attempts in the House to enact grazing fee increases have been stopped in the Senate.<sup>55</sup>

---

47. See Interview with Thomas A. Kourlis, Commissioner of the Colorado Department of Agriculture, in Golden, Colo. (Mar. 27, 1997). Public lands may be more remote than private lands, leading to increased travel costs, and public lands are often unfenced, so shepherds must be hired for sheep and round-up costs may be higher. See *id.*; see also Ludmilla Lelis, *Changes on the Ranges—Ranchers Denounce Fee Increase*, USA TODAY, Aug. 10, 1993, at A3. Ranchers also claim that maintenance costs for the public lands are higher than for private lands. See *id.*

48. See Interview with Thomas A. Kourlis, *supra* note 47.

49. See *id.*

50. See 139 CONG. REC. S11, 629-01, 11,637 (daily ed. Sept. 14, 1993).

51. See Interview with Thomas A. Kourlis, *supra* note 47.

52. See, e.g., HESS & HOLECHEK, *supra* note 41, at 2.

53. See 136 Cong. Rec. H13424-01, 13444 (daily ed. Oct. 27, 1990).

54. See *id.*

55. See Andrew Taylor, *President Will Not Use Budget to Rewrite Land-Use Laws*, 51 CONG. Q. WKLY. REP. 833 (1993).

### C. Range Condition

Aside from the political issue of grazing fees, the reason grazing has become such a contentious issue in the West is that it has a substantial impact on the ecological health of the public lands. It is difficult, given the current state of science, to pinpoint the exact impact of grazing on the land,<sup>56</sup> and this uncertainty has sometimes made it difficult for ranchers and environmentalists to find solutions to their disputes. Nonetheless, the weight of the evidence indicates that ecosystems on the public lands have been significantly harmed by overgrazing.

Environmentalists argue that overgrazing "harms biodiversity, competes with wildlife, erodes soils, degrades riparian areas, and reduces water quality."<sup>57</sup> The cattle used by most western ranchers originated from Eurasian stock that was adapted to relatively humid climates.<sup>58</sup> As a result, cattle in the West tend to congregate around bodies of water, leading the Environmental Protection Agency to warn that, primarily due to overgrazing, western riparian areas are in the "worst condition in history."<sup>59</sup> Overgrazing causes a slow decline in the diversity and abundance of native plant species and a corresponding increase in exotic species that are less productive in terms of forage, watershed protection, and wildlife habitat.<sup>60</sup> It also causes soil loss, changes in stream channel morphology, and can eventually lead to severe erosion, deep gullies, and desertification.<sup>61</sup> Some environmentalists consider the range problems to be insurmountable while grazing continues and call for a complete removal of cattle from public lands in the West,<sup>62</sup> others believe that allowing

---

56. See Bruce M. Pendery, *Reforming Livestock Grazing on the Public Domain: Ecosystem Management-Based Standards and Guidelines Blaze a New Path for Range Management*, 27 ENVTL. L. 513, 529 (1997) (noting that the traditional scientific technique for assessing range condition, the Dyksterhuis method, has led to contradictory interpretations of the condition of the range).

57. William E. Riebsame, *Draft Statement for Babbitt Hearings* 1 (1994) (on file with author) (noting the views of environmentalists).

58. See Wuerthner, *supra* note 9; see also EWING, *supra* note 1 (chart depicting origins of North American cattle breeds is located between the cover pages at the beginning of the book).

59. Jeff Burgess, *You Say You Want to Cut Government Spending? Kick Off the Cows!*, HIGH COUNTRY NEWS, Mar. 20, 1995, at 11.

60. See Wuerthner, *supra* note 9.

61. See 60 Fed. Reg. 9907 (1995); see also WILKINSON, *supra* note 14, at 27.

62. See Wuerthner, *supra* note 9.

ranchers to run livestock using good range management techniques can improve damaged rangelands more quickly and completely than is possible by removing cattle altogether.<sup>63</sup>

Studies by the BLM support the environmentalists' position on the condition of the range. The BLM's Final Environmental Impact Statement for Rangeland Reform '94 found the public range to be, on the whole, in less than satisfactory condition.<sup>64</sup> On BLM lands, 34% of the riparian range habitat was found to be "functioning properly," while 46% was "functioning at risk" and 20% was "not functioning properly."<sup>65</sup> Upland range habitat, where cattle are less likely to congregate, fared substantially better, with 57% of the range functioning properly and 43% functioning at risk or improperly.<sup>66</sup> Overall, nearly 43 million acres of BLM permit land were found to be either "non-functioning" or "functioning but susceptible to degradation."<sup>67</sup> The BLM found that without range reform, the "overall trends would be a slow, steady, long-term decline in conditions."<sup>68</sup>

Ranchers respond to these concerns by noting that they have an interest in being good stewards of the land on which they make their livelihoods and claiming that the environmentalists overstate range problems. They often agree with environmentalists that good range management techniques can lead to a healthier range and—they might add—increased profits.<sup>69</sup> The

---

63. See DAN DAGGET, *BEYOND RANGELAND CONFLICT: TOWARD A WEST THAT WORKS* 9 (1995). Dagget notes that ecologists who have studied the range grasses have found "evidence of an interdependency, if not a direct symbiosis, between ungulates [hoofed animals that are typically herbivores] and the grassland habitat that support[] them." *Id.* at 10. Without a replacement for roaming bison, mammoth, and other ungulates which co-evolved with the grasses in "recent" evolutionary times, grasses suffer seed dispersal problems, dead plant tissue accumulates and blocks sunlight to live tissue, and there is less fertilization of soil. *See id.* Dagget's book examines ten western ranches which have very healthy ecosystems, in terms of both biomass and biodiversity, as a result of good range management techniques. *See id.* at 6.

64. See BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF THE INTERIOR, *RANGELAND REFORM '94 FINAL ENVIRONMENTAL IMPACT STATEMENT* 1 (1994).

65. *Id.*

66. *See id.*

67. 60 Fed. Reg. 9894, 9907 (1995).

68. *Id.*

69. *See* DAGGET, *supra* note 63. Many ranchers have used an approach developed by Allan Savory called Holistic Resource Management ("HRM"). *See* David E. Brown, *Out of Africa*, *WILDERNESS*, Winter 1994, at 24, 26-27. HRM is based on non-selective and short-duration grazing techniques in which large numbers of animals are placed on small plots of land for short durations of time,

former editor of *Cattlemen* magazine summarized: "Grass is the basic source of wealth in the ranching industry . . . . Long before ecology and its cousins became buzzwords, the Society for Range Management was promoting the application of scientific methods on rangeland, encompassing . . . not just man and plants and animals, but also meteorology and all the earth sciences."<sup>70</sup> Ranchers also note that, on the whole, range conditions are better than they were at the turn of the century before range regulation began. They argue that it is irrational for "environmental extremists" to use the late nineteenth-century condition of the range as a benchmark for pristine range, because the primary consumers of grasses, the buffalo, were largely exterminated at that time and the range was undergrazed.<sup>71</sup> In this regard, ranchers point out that the western prairies have evolved under grazing pressure, and they criticize environmentalists who urge a complete halt to grazing in order to "preserve" grassland.<sup>72</sup> Or, as one researcher noted: "You can't just preserve grassland; you've got to handle it in a *natural* way."<sup>73</sup>

There may also be bureaucratic incentives to understate the condition of the range. One rancher suggested that BLM range statistics may be biased toward the BLM's "needs improvement" category<sup>74</sup> because they are based on the ranchers' own assess-

---

after which the plots are given months of rest. *See id.* at 27. Concentrated grazing insures that all available forage is consumed, not just the most palatable species, and lengthy rest periods insure that plants have time to mature and reproduce. *See id.* One of HRM's drawbacks is that it requires dividing formerly open ranches into several paddocks, with an increase in fencing and water development capital expenditures. *See id.* Not all ranchers have embraced HRM. In fact, the American Forage and Grassland Council's Terminology Committee declined to define HRM, indicating instead that HRM was simply "not a recommended term." *See* FOREST AND GRAZING TERMINOLOGY COMMITTEE, AMERICAN FORAGE & GRASSLAND COUNCIL, TERMINOLOGY FOR GRAZING LANDS AND GRAZING ANIMALS 9 (1991).

70. Frank Jacobs, *Foreword* to SHERM EWING, *THE RANGE* at xi-xii (1990).

71. *See* SHERM EWING, *THE RANGE* 11-12 (1990). Ewing asserts that "based on a lifetime study of the land, . . . our range today is in a damn sight better condition than it was in 1864 when the buffalo still roamed free." *Id.* at 12.

72. *See* Tom Lawrence, *in* EWING, *supra* note 71, at 217. Tom Lawrence is a geneticist who received a Ph.D. from the University of Alberta before spending 35 years breeding grasses in Saskatchewan, Canada.

73. *Id.* at 217.

74. Since the early 1980s, the BLM has divided allotments into three categories: "M" ("Maintain"), which means the allotment has high to moderate production potential, is producing at or near its potential, and present management is satisfactory; "I" ("Improve"), which means the allotment has high to moderate production potential, is producing at a low to moderate level, and the allotment will respond to improved management; and "C" ("Custodial"), which means the allotment

ments of the conditions of their allotments.<sup>75</sup> The rancher noted that historically it has been very difficult to get the BLM to provide resources for range improvements unless the allotment in question is in the "needs improvement" category.<sup>76</sup> Hence, there may be an incentive for ranchers to understate the condition of their allotment in order to capture the attention and resources of the BLM.

Regardless of the exact condition of the range, it is clear that many non-ranchers consider portions of the BLM lands to be overgrazed. Overgrazing of riparian areas is of particular concern because these areas are crucial components of western ecosystems. The perception that ranchers are being subsidized through low grazing fees to carry on an enterprise that is damaging the ecosystems of lands belonging to the people of the United States has mobilized many concerned citizens. Whereas fifty years ago such a public sentiment might have gone unnoticed by powerful ranching interests, modern environmental laws and shifting power structures in the West have forced public land ranchers to respond to environmentalists' concerns. These topics are the subject of the following two sections.

#### *D. Legal Framework*

Public land grazing was initially regulated by the Taylor Grazing Act of 1934,<sup>77</sup> discussed in the following section, but this Act has since been largely superseded. In the modern era, federal control of the range has been codified by three principal laws: the National Environmental Policy Act,<sup>78</sup> the Federal Land Policy and Management Act of 1976,<sup>79</sup> and the Public Rangelands Improvement Act of 1978.<sup>80</sup> On the whole, these acts provide the BLM with considerable discretion in delineating substantive range management standards, while affording less discretion in the

---

has low production potential, is producing at or near its potential, and opportunities for improved management do not exist. See MUHN & STUART, *supra* note 25, at 239.

75. See Interview with Thomas A. Kourlis, *supra* note 47. Mr. Kourlis owns a sheep ranch in Colorado and participated in the Colorado Group, discussed *infra* at Part IV.E.-F.

76. See *id.*

77. 43 U.S.C. §§ 315-315(r) (1994).

78. 42 U.S.C. §§ 4321-4370 (1994).

79. 43 U.S.C. §§ 1701-1784 (1994).

80. *Id.* §§ 1901-1908.

realm of procedural standards. They also offer the public, and particularly environmentalists, avenues for increased participation in BLM land use planning and management decisions.

The National Environmental Policy Act of 1970 ("NEPA")<sup>81</sup> requires the BLM to prepare Environmental Impact Statements ("EISs") for its grazing districts and to solicit public input on these statements.<sup>82</sup> In the 1970s, these EISs focused public scrutiny on weaknesses in the BLM's range management practices and the poor condition of the ranges, which at the time were still producing less than one-half their grass-growing capacity.<sup>83</sup> In 1974, NEPA was given substantial teeth in the BLM grazing context when the Federal District Court for the District of Columbia construed the Act to require individual EISs for each of the BLM's 144 grazing districts, rather than one EIS for the entire grazing program nationwide.<sup>84</sup> Since then, the EISs have revealed "what many have known: Much of the public grazing lands are in poor condition compared to their historical potential; one clear cause for this condition is overgrazing; and improvement in range condition depends largely upon reducing the number of grazing animals and limiting the areas available for grazing."<sup>85</sup>

The Federal Land Policy and Management Act of 1976 ("FLPMA")<sup>86</sup> granted the BLM its first permanent authority to manage its land for sustained yield and for multiple uses, including wildlife, recreation, grazing and other uses.<sup>87</sup> The BLM was also given more power to levy fines on ranchers and to reduce

---

81. 42 U.S.C. §§ 4321-4370 (1994).

82. *See id.* § 4332.

83. *See* ROBERT L. GLICKSMAN & GEORGE CAMERON COGGINS, *MODERN PUBLIC LAND LAW IN A NUTSHELL* 213-14 (1995).

84. *See* *Natural Resources Defense Council v. Morton*, 388 F. Supp. 829 (D. D.C. 1974).

85. GEORGE CAMERON COGGINS, ET AL., *FEDERAL PUBLIC LAND AND RESOURCES LAW* 717-18 (1993).

86. 43 U.S.C. §§ 1701-1784 (1994).

87. *See id.* § 1701(a)(7). "Sustained yield" is defined as "the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the public lands consistent with multiple use." *Id.* § 1702(h). "Multiple use" is defined as "a combination of balanced and diverse resource uses that takes into account the long-term needs of future generations for renewable and nonrenewable resources, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values . . ." *Id.* § 1702(c).

the number of AUMs allotted.<sup>88</sup> On the other hand, ranchers were given more security because grazing permits were issued for fixed ten-year periods,<sup>89</sup> and ranchers who improved rangelands would be compensated if the ranges were put to non-grazing use. FLPMA section 1752(a) provides the Secretary of the Interior with the authority to issue "permits and leases for domestic livestock grazing on public lands . . . subject to such terms and conditions the Secretary . . . deems appropriate and consistent with the governing law, including, but not limited to the authority . . . to cancel, suspend, or modify a grazing permit or lease, in whole or part . . ."<sup>90</sup> It was principally under the authority of FLPMA and the Taylor Grazing Act that Secretary Babbitt issued the Rangeland Reform '94 regulations.<sup>91</sup>

Under FLPMA, grazing management is facilitated through Allotment Management Plans ("AMPs"). An AMP "prescribes the manner in, and extent to, which livestock operations will be conducted in order to meet the multiple use, sustained-yield, economic and other needs and objectives" determined to be relevant by the BLM.<sup>92</sup> Not all BLM allotments have AMPs, but on those which do, the terms of the AMPs are incorporated into grazing permits.<sup>93</sup> AMPs are required to be "tailored to the specific range condition of the area" and must be periodically reviewed to determine whether they have been effective in improving range conditions.<sup>94</sup> The development of an AMP requires the "careful and considered consultation, cooperation, and coordination with the lessees, permittees, and landowners involved."<sup>95</sup> The only permissible alternative to AMPs under FLPMA is for the Secretary of the Interior to issue permits without AMPs and without consultation with permittees, but to do so incorporating "in grazing permits . . . such terms and conditions as [the Secretary] deems appropriate."<sup>96</sup>

---

88. *See id.* § 1752(a).

89. *See id.*

90. *Id.*

91. *See* 60 Fed. Reg. 9894, 9894 (1995).

92. 43 U.S.C. § 1702(k) (1994).

93. *See* COGGINS, ET AL., *supra* note 85, at 718.

94. *See* 43 U.S.C. § 1752(d).

95. *Id.*

96. *Id.* § 1752(e); *see also* Natural Resources Defense Council v. Hodel, 618 F. Supp 848, 855-61 (E.D. Cal. 1985).

Finally, in the Public Rangelands Improvement Act of 1978 ("PRIA"),<sup>97</sup> Congress found that "vast segments of the public rangelands are producing less than their potential . . . [and] are in unsatisfactory condition" and that "some areas may decline further . . . ."<sup>98</sup> To counter these trends, Congress declared a national policy of improving the range<sup>99</sup> and outlined a series of steps to improve range conditions.<sup>100</sup> These steps included better record-keeping of range conditions,<sup>101</sup> increased funding for range improvement,<sup>102</sup> increased grazing fees,<sup>103</sup> and an experimental range stewardship program.<sup>104</sup>

Unfortunately, FLPMA and PRIA have not provided the BLM with workable standards and guidelines by which to manage the public range. In fact, in *Natural Resources Defense Council v. Hodel*,<sup>105</sup> the U.S. District Court for Nevada held:

The declarations of policy and goals in [the acts] contain only broad expressions of concern and desire for improvement. They are general clauses and phrases which "can hardly be considered concrete limits upon agency discretion. Rather it is language which 'breaths discretion at every pore.'"<sup>106</sup>

As such, the court declined to strike down certain BLM land management plans as "arbitrary and capricious" under the Administrative Procedure Act<sup>107</sup> simply because the BLM "probably *could* have made defensible livestock adjustments where their data showed overutilization, poor range condition, and downward trend."<sup>108</sup> While some environmentalists have had more success in litigating overgrazing under FLPMA,<sup>109</sup> on the whole the modern legal framework presents a difficult challenge for environmentalists who choose to pursue their cause in

---

97. 43 U.S.C. §§ 1901-1908 (1994).

98. *Id.* § 1901(a)(1).

99. *See id.* § 1901(b).

100. *See id.* §§ 1903-1908.

101. *See id.* § 1903.

102. *See* 43 U.S.C. § 1904 (1994).

103. *See id.* § 1905.

104. *See id.* § 1908.

105. 624 F. Supp. 1045 (D. Nev. 1985).

106. *Id.* at 1058 (citations omitted).

107. *See* 5 U.S.C. §§ 551-558 (1994).

108. *Natural Resources Defense Council*, 624 F. Supp. at 1062.

109. *See* Joseph M. Feller, *The Comb Wash Case: The Rule of Law Comes to the Public Rangelands*, 17 PUB. LAND & RESOURCES L. REV. 25 (1996).

court.<sup>110</sup> Legislative solutions are also difficult to achieve.<sup>111</sup> Hence, environmentalists, like ranchers, have an incentive to pursue solutions to disputes over public land management through collaboration. To some extent, NEPA, FLPMA, and PRIA have shed light on environmental problems caused by overgrazing, and they have placed procedural hurdles in the path of ranchers and range managers who allow overgrazing. As such, they provide an incentive for ranchers to collaborate with environmentalists. However, far greater incentives for ranchers have come from the social, political, and economic changes in the West over the past fifty years. These changes are the subject of the following section.

### *E. Ranching in the "New West"*

Until the latter part of this century, the dominance of grazing interests over the public range was largely unchallenged. The waning influence of ranchers reflects the fundamental economic and social changes that have occurred in the West over the past fifty years.<sup>112</sup> Until 1940, almost one-half the population of the West was directly employed in ranching, mining, farming, and the processing of agricultural and mineral products.<sup>113</sup> Many of the remaining half were employed in services and industries that supported ranching, agriculture, and resource extraction.<sup>114</sup> Following World War II, the West's population began to boom, and its economy shifted from traditional sectors to one "centered on trade, fabrication of a vast array of materials, finished goods, and a growing complement of services."<sup>115</sup> During the last twenty-five years, the population of the West has grown by 18%,

---

110. *See id.* at 26; *see also* National Resources Defense Council v. Hodel, 624 F. Supp. 1045 (D. Nev. 1985).

111. *See infra* notes 175-79 and accompanying text; *see also* Karl N. Arruda and Christopher Watson, *The Rise and Fall of Grazing Reform*, 32 LAND & WATER L. REV. 413, 428 (1997).

112. *See generally* PAMELA CASE & GREGORY ALWARD, U.S. DEP'T OF AGRIC., PATTERNS OF DEMOGRAPHIC, ECONOMIC AND VALUE CHANGE IN THE WESTERN UNITED STATES 1 (1997) (published by the U.S. Forest Serv. for the Western Water Policy Review Advisory Comm'n) (describing changes in the West over the past 50 years).

113. *See id.*

114. *See id.*

115. *Id.*

as compared with 11% for the entire nation,<sup>116</sup> and the population distribution in the West has compressed into “urban archipelagos.”<sup>117</sup> Given these changes, ranching is no longer a driving force in most western economies. A recent study grouped enterprises in the West into twenty industrial sectors.<sup>118</sup> Using 1993 economic data, the “livestock” sector ranked fifteenth in terms of dollar earnings, but comprised less than 1% of the total earnings of all twenty industrial sectors.<sup>119</sup>

As ranching’s economic influence has waned, the influence of environmentalists has increased. A 1994 Times-Mirror poll conducted by the Roper organization found that 60% of Americans believe that “environmental protection is more important than economic development when compromise cannot be found.”<sup>120</sup> However, the impact of the environmental movement in the context of ranching is tempered by the fact that 81% of Americans consider “loss of natural places” to be an environmental problem that needs to be addressed.<sup>121</sup> This suggests environmentalists may prefer keeping ranchers on the land—especially on the private base ranches that are often surrounded by public lands—rather than allowing it to be developed for other purposes.<sup>122</sup> The Times-Mirror survey also found that people often associate environmental protection with what they consider to be increasingly scarce public lands:

[P]eople from every [western] subregion and every age group believe that public lands . . . play *the decisive role* in maintaining the environment. Whereas people do not believe that protecting wildlife species is a high priority for private land-

---

116. See *id.* at 7.

117. *Id.* at 8-9 (describing “areas of very high population density, surrounded by [a ring of suburbs and] large rural areas whose populations are sparse and declining”).

118. See CASE & ALWARD, *supra* note 112, at 10-13.

119. See *id.* at 13.

120. *Id.* at 18 & Plate 20.

121. *Id.* at 18 & Plate 21.

122. See Frank Clifford, *Ecologists and Ranchers Try to Mend Fences*, L.A. TIMES, Sept. 6, 1993, at A1. One group of ranchers and environmentalists, the High Country Citizens Alliance of Gunnison County, Colorado, discussed *infra* in Part III.D, distilled their sentiments on the interaction between growth and ranching to the slogan “Cows Not Condos.” See *id.* Officials estimate that 20% of the private ranchland in Gunnison County was replaced by subdivisions between 1983 and 1993. See *id.* at A32.

owners . . . there is “zero tolerance” for anything less than environmental protection on the public lands.<sup>123</sup>

Furthermore, westerners are not content to let others protect their public lands:

People believe that entire communities should play a role in finding ways to act on environmental matters or in management of natural resources—not just landowners or policy-makers or lawyers and the courts. People make it clear that they do not want “outsiders” simply dictating to them how they should manage the environment . . . and their lives.<sup>124</sup>

Hence, it would appear that by the 1990s the stage was set for an inclusive, collaborative, and locally-based approach to the environmental problems that existed on the BLM’s public lands as a result of grazing. However, local control was not a new concept in grazing management. In fact, it was a concept that dated to nearly the beginning of federal regulatory control of the ranges, and which—as the current condition of the range indicates—has been largely unsuccessful in protecting the environment of the public range. The following section examines the history of local control of the range, so that historical management practices may be distinguished from the Rangeland Reform ‘94 approach.

## II. EARLY RANGELAND REFORM: THE TAYLOR GRAZING ACT AND FERRY CARPENTER’S GRAZING ADVISORY BOARDS

The history of grazing on public lands, and particularly of the early Grazing Advisory Boards, will be instructive in Part VI’s analysis of the potential pitfalls facing DOI’s latest grazing advisory boards, the Resource Advisory Councils (“RACs”). In this regard, I would like to recognize the groundbreaking work of University of Colorado geography doctoral candidate, Hannah Gosnell, whose research into early range management efforts and attitudes formed the foundation for much of the history below.<sup>125</sup>

---

123. CASE & ALWARD, *supra* note 112, at 21 (emphasis in original).

124. *Id.* at 22.

125. See Hannah Gosnell, Does Local Control Work? (1994) (unpublished student research paper, University of Colorado, Boulder (on file with author)).

In the nineteenth century, ranchers settling the West would typically homestead a small claim with a convenient water source and then use the surrounding public lands for grazing livestock. Even though the ranchers were technically trespassing on public lands, the federal government looked the other way, following a laissez-faire policy of "disposal" of the public domain in order to encourage people to settle in the West.<sup>126</sup> This policy was ratified in 1890, when the Supreme Court held that Congress had, by acquiescence, granted an implied license for grazing uses.<sup>127</sup> As a result, ranchers had every incentive to exploit the range before others did the same, resulting in a classic "tragedy of the commons."<sup>128</sup> By the mid-1930s, a Department of Agriculture report found that overgrazing, bad stewardship policies, and the dust bowls had diminished the grazing capacity of the public range by over 50%, with "plant cover . . . depleted to an alarming degree."<sup>129</sup>

Conditions were ripe for range reform, and Congressman Edward Taylor, a rancher from Colorado, was able to push his Taylor Grazing Act<sup>130</sup> through the House of Representatives in April 1934 with the support of President Franklin Roosevelt's reform-minded Secretary of the Interior, Harold Ickes.<sup>131</sup> Ickes, like Secretary Babbitt sixty years later,<sup>132</sup> considered an administrative reform if the bill did not pass.<sup>133</sup> Assistance in

---

126. See GLICKSMAN & COGGINS, *supra* note 25, at 206; see also Gosnell, *supra* note 125, at 12.

127. See *Buford v. Houtz*, 133 U.S. 320, 326 (1890).

128. See Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243, 1244 (1968). Hardin illustrates the term "tragedy of the commons" by describing a situation in which a common pasture is shared by multiple herdsmen. In determining stocking level for the common pasture, each herdsman will ask: "What is the utility to me of adding one more animal to my herd?" The utility for each herdsman has a positive and a negative component: the positive component is represented by the profit the herdsman will earn from the sale of the additional animal; the negative component is represented by the additional overgrazing caused by one more animal. Since the overgrazing component is a burden shared by all the herdsmen sharing the commons, while the profit component is enjoyed entirely by the single herdsman, in every instance a rational herdsman will conclude his best course to maximize his own gain is to add another animal. Unfortunately, in a world of finite pasture resources, this course of action will result in the ruin of the commons. "Freedom in the commons brings ruin to all." *Id.*

129. Gosnell, *supra* note 125, at 12.

130. 43 U.S.C. §§ 315-315(r) (1994).

131. See Gosnell, *supra* note 125, at 17.

132. See *infra* note 178 and accompanying text.

133. See HAROLD L. ICKES, *THE SECRET DIARY OF HAROLD L. ICKES* 143 (1953);

passing the bill through the Senate was forthcoming in the form of massive dust storms in the West, which deposited dust on Washington, D.C., and New York City a few days before the Senate vote, prompting one senator to call the dust storms "the most tragic, the most impressive lobbyist that ever came to this Capital."<sup>134</sup>

The Taylor Grazing Act was intended by its author to have minimal impact on western grazing interests, implementing only a modicum of conservation and "systematized" use of the range.<sup>135</sup> Fees were only five cents per AUM, and grazing levels were maintained at pre-1934 levels, with ranchers "in or near a grazing district" receiving a grazing "preference," which ensured that newly issued permits would usually go to existing stock interests.<sup>136</sup> Permits were for a period of "not more than ten years," subject to a preferred right of renewal by the original permittee, and the issuance of a permit was not intended to "create any right, title, interest, or estate in or to the lands."<sup>137</sup>

Anxious to "win the confidence of stockmen and gain their cooperation in improving the range,"<sup>138</sup> Secretary Ickes decided to forego the Forest Service's authoritarian style of range management in favor of a less confrontational approach.<sup>139</sup> He appointed charismatic Colorado cattleman and Harvard Law School graduate Farrington "Ferry" Reed Carpenter as the first director of DOI's newly formed Division of Grazing.<sup>140</sup> Carpenter took the job with the caveat that he would not be forced to direct a top-down bureaucracy and soon set about forming local

---

*see also* Gosnell, *supra* note 125, at 18.

134. BUREAU OF LAND MANAGEMENT, UNITED STATES DEPARTMENT OF THE INTERIOR, THE TAYLOR GRAZING ACT: 50 YEARS OF PROGRESS 9 (1984) [hereinafter "50 YEARS OF PROGRESS"]; *see also* Gosnell, *supra* note 125, at 18.

135. *See* CARPENTER, *supra* note 24. Congressman Taylor downplayed the restrictive aspects of the proposal stating that: "My bill merely calls for nominal regulation and systemized use of the range." Gosnell, *supra* note 125, at 17. In addition, Taylor used the prospect of assistance from the Civilian Conservation Corps to aid in free range improvement (water resource development, predator control, fence and road construction, removal of poisonous plants, and other aid) to gain support from the livestock industry. *See id.*

136. *See* WILKINSON, *supra* note 14, at 156, 67.

137. 43 U.S.C. § 315(b) (1994).

138. Gosnell, *supra* note 125, at 19.

139. *See id.*

140. *See* CARPENTER, *supra* note 24, at 157; *see also* Gosnell, *supra* note 125, at 20.

"Grazing Advisory Boards" throughout the West.<sup>141</sup> Carpenter gave the Boards power to classify lands in their respective districts, recommend licenses for individual stockmen, and suggest local rules for livestock operations.<sup>142</sup>

The Grazing Boards proved extremely popular among cattlemen who were nervous about federal oversight by distant bureaucrats who "didn't know which end of the cow got up first."<sup>143</sup> Carpenter believed that only ranchers were capable of developing effective range regulation, and he gave the Grazing Boards the power necessary to do so, creating a system that came to be known as "Home Rule on the Range."<sup>144</sup> He created the Grazing Boards with the belief that the integrity of the Board members and the infrequency of corruption would lead to a "fair distribution of the grazing resources."<sup>145</sup> Conservation at the time was not understood to be a very complicated issue, and Carpenter did not appear to have considered that the Grazing Boards might be reluctant to make decisions that would benefit the land and its natural resources to the detriment of the ranchers' economic interests.<sup>146</sup> In determining the number of AUMs that would be allocated to each rancher, Carpenter did not mention environmental limits, but rather stated that the minimum number "would probably be fixed at a figure which would insure economical operation."<sup>147</sup>

In fact, history has shown that Grazing Boards were dominated by large-scale cattlemen and woolgrowers who were not able to place the interests of their communities and the environment above their own parochial interests.<sup>148</sup> Small ranchers throughout the West complained that the Grazing Boards were controlled by self-interested, locally powerful ranchers, who showed a lack of concern for smaller operators.<sup>149</sup>

---

141. See CARPENTER, *supra* note 24, at 156; see also Gosnell, *supra* note 125, at 23.

142. See CARPENTER, *supra* note 24, at 162, 164-66.

143. *Id.* at 155; see also Gosnell, *supra* note 17, at 25-26. For the interested reader, the back end of a cow gets up first.

144. Gosnell, *supra* note 125, at 3.

145. *Id.* at 26.

146. See *id.* at 166-67; see also *id.* at 26-27.

147. *Id.* at 32.

148. See *id.* at 30.

149. See *id.* In an open letter, one organization criticized the grazing boards as follows:

The Taylor Grazing Act would have worked out fairly well had it been

The gradual deterioration of the public range<sup>150</sup> suggests that the Grazing Boards had a similar lack of concern about protecting range ecosystems. Ferry Carpenter, in colorful phraseology, noted, "One funny thing I found was that the drier and more worthless the land, the harder stockmen fight for it. . . . I've seen them fight over land where 640 acres wouldn't support a night-crawler."<sup>151</sup> Apparently, there was little concern that this type of land was intrinsically unsuited to grazing as well. Gosnell writes:

Perhaps the main problem with the approach to conservation of the public domain in the 1930s lay in the lack of "ecosystem perspective," a view that many ranchers and bureaucrats take for granted today. Because of this fundamental lack of awareness of the long term benefits that come from a more sensitive approach to land management, the ranchers and bureaucrats who did their best to implement the Taylor Grazing Act *had* to fall short of today's standards. It is important to remember that in their minds, much was being accomplished.<sup>152</sup>

Over time, Secretary Ickes became concerned that Carpenter was delegating too much authority to his grazing boards. He reminded Carpenter that:

[T]hese local committees are nothing more than advisory bodies. They are not organized or equipped to handle administrative matters nor does the law authorize the Secretary of the Interior to delegate authority to them. You have encouraged these local committees to perform functions—delegating to the committees the entire administration of the Taylor Grazing Act.<sup>153</sup>

---

administered by the land offices or federal agents, like we were told it would be. But it was turned over to an advisory board . . . consisting of the largest stockmen in the country. The Secretary of the Interior . . . made certain flexible, elastic rules . . . thinking that in this way all . . . small ranchers would be eligible. But the advisory board has used these elastic rules to protect themselves and other large stockmen and not to help the smaller unit.

*Farrington Carpenter Papers*, unidentified newspaper article, Oct. 13, 1936 (The Carpenter Papers are located in the Western History Collection of the Denver Public Library, Denver, Colo.); *see also* Gosnell, *supra* note 125, at 30.

150. *See supra* notes 56-68 and accompanying text.

151. EWING, *supra* note 71, at 137.

152. Gosnell, *supra* note 125, at 34.

153. Carpenter, *supra* note 24, at 170.

In October 1935, Secretary Ickes fired Carpenter, but Carpenter was reinstated a few days later after western ranching interests—pleased with Carpenter's performance—intervened through President Roosevelt.<sup>154</sup> However, by 1938, the early era of "Home Rule on the Range" came to an end with Carpenter's resignation and his replacement by Richard Rutledge, a long-time Forest Service employee who favored greater federal control over the public range.<sup>155</sup>

After 1938, the Grazing Boards persisted with diminished influence and increased federal control. The boards were given their first statutory authority by the Grazing District Advisory Boards Act of 1939.<sup>156</sup> The Act provided that each grazing district would have "an advisory board of local stockmen" consisting of five to twelve members and, at the discretion of the Secretary of the Interior, one "wildlife representative."<sup>157</sup> Unlike Carpenter's early advisors, who were simply elected by local stockmen, Grazing Advisory Board nominees were elected by local permittees and then approved by the Secretary.<sup>158</sup> The Secretary also had the power to remove acting advisors.<sup>159</sup> The boards were responsible for making recommendations on applications for new grazing permits, for suggesting rules and regulations, and for recommending appropriate seasons of use and range carrying capacities.<sup>160</sup> The role of Grazing Boards was again codified in the Federal Land Policy and Management Act of 1976,<sup>161</sup> but their statutory authority under this Act expired at the end of 1985.<sup>162</sup>

---

154. *See id.* at 168.

155. *See* MUHN & STUART, *supra* note 25, at 41; Gosnell, *supra* note 17, at 35.

156. 43 U.S.C. § 3150-1 (1994); *see also* 50 YEARS OF PROGRESS, *supra* note 134, at 10.

157. 43 U.S.C. § 3150-1(a).

158. *See id.*

159. *See id.*

160. *See id.* § 3150-1(b).

161. *See id.* §§ 1701-1784 (1994). The Grazing Advisory Board provisions were codified at 43 U.S.C. § 1753.

162. *See id.* § 1753(f). From December 31, 1985, until the implementation of the RACs on August 21, 1995, the Grazing Boards were authorized by Secretarial Order. *See* 60 Fed. Reg. 9894, 9897 & 9912 (1995).

### III. MODERN RANGE REFORM: THE TRAVELS AND TRAVAILS OF SECRETARY BABBITT

#### A. *Early Promise for Grazing Reform Under the Clinton Administration*

When Bruce Babbitt, a renowned consensus-builder and member of a prominent Arizona ranching family, was appointed as Secretary of the Interior in 1992, many thought range management reform was finally at hand. Indeed, it was with no small degree of optimism that Secretary Babbitt chose range management reform as his first major land-use reform agenda in 1993. Secretary Babbitt told the National Press Club in Washington, D.C., that, "[w]e are set on creating a new American land ethic . . . . This administration is solidly committed to land-use reform, and the question is not if these changes will occur, but how they will occur."<sup>163</sup> Secretary Babbitt had good reason to be optimistic. Seventy-three percent of those voting for President Clinton in 1992 cited the environment as one of their concerns, and there was bipartisan support for cutting government subsidies which had contributed to federal budget overruns.<sup>164</sup> Furthermore, as Governor of Arizona, Babbitt had proven himself to be a master at "soothing tempers and changing minds" to build consensus.<sup>165</sup>

Secretary Babbitt wanted to reform federal management of water, timber, mining, and grazing on public lands, but he chose to take on grazing first, perhaps believing it would be the least complicated and most politically manageable of the major problem areas.<sup>166</sup> In fact, the process of range management reform would consume much of Secretary Babbitt's calendar for

---

163. Jon Christensen, *Bruce Babbitt on Western Land Use: 1993 Is the 'Year of Decision,'* HIGH COUNTRY NEWS, May 17, 1993, at 8.

164. See Norman J. Vig, *Presidential Leadership and the Environment*, in ENVIRONMENTAL POLICY IN THE 1990S 71, 88 (Norman J. Vig & Michael E. Kraft eds., 2d ed. 1994); see also Gosnell, *supra* note 17, at 30.

165. Joan Hamilton, *Babbitt's Retreat*, 79 SIERRA 52, 76 (1994). The most notable example of Babbitt's peacemaking abilities occurred when he brokered a plan to manage Arizona's profligate use of groundwater in 1980. See also Jon Healey & Phillip A. Davis, *Babbitt Leans on His Actions on Way to Confirmation*, 51 CONG. Q. WKLY. REP. 176, 176 (1993) (quoting Babbitt in his confirmation hearing as promising: "If I'm confirmed, it will be my task . . . to represent not any one . . . group[. . .] but to represent the public interest, to reconcile the conflicts, to find the common ground.")

166. See Christensen, *supra* note 163.

the next three years, forcing him to modify his plan several times, and ultimately to forge the input of 19,000 citizens across the West into an effective and politically feasible plan.<sup>167</sup>

### *B. The First Attempt at Grazing Reform*

Secretary Babbitt initially approached range reform through a process involving some public participation, but not the extensive participation that marked his later efforts. He began the reform process in April and May of 1993 with four town-hall meetings in Montana, Nevada, New Mexico, and Grand Junction, Colorado.<sup>168</sup> Two months later and with little further public input, DOI published an advanced notice of proposed rulemaking for Rangeland Reform '94.<sup>169</sup> The proposal called for: (1) more than doubling the grazing fee to \$4.28 over a three year period; (2) creating a new set of mandatory national standards and guidelines for range ecosystem management; (3) reducing permit terms to less than ten years for ranchers who failed to meet national guidelines; (4) replacing the single-interest Grazing Advisory Councils with multiple-interest advisory boards; and (5) ending the assignment of water rights on public lands to grazing permittees.<sup>170</sup> The plan was expected to raise \$98.5 million in additional grazing fees over the ensuing four years.<sup>171</sup> Environmentalists largely favored the plan,<sup>172</sup> but ranchers argued that it would put them out of business and that it was fundamentally unfair.<sup>173</sup>

Senator Pete Dominici (R-NM) protested that DOI's rules were "too drastic to go into effect by executive order,"<sup>174</sup> and he

---

167. See 60 Fed. Reg. 9894, 9894 (1995).

168. See Christensen, *supra* note 163; see also *Babbitt Takes Grazing Hike on the Road; Does He Need Hill?*, 18 PUB. LANDS NEWS 4, 4 (1993). The principal purpose of these meetings was to test public opinion on the possibility of increasing grazing fees on BLM lands. See *id.* The Clinton Administration had indicated that it expected grazing fees to provide increased revenue to the Treasury. See *id.*

169. See 58 Fed. Reg. 43,208 (1993).

170. See Tom Kenworthy, *U.S. to Tighten Grazing Rules, Increase Fees on Public Lands*, WASH. POST, Aug. 10, 1993, at A1.

171. See Melissa Healy, *Big Hike in Grazing Fees Proposed by Babbitt*, L.A. TIMES, Aug. 10, 1993, at A1.

172. See Gosnell *supra* note 17, at 28-29.

173. See Healy, *supra* note 171.

174. See *Environment: Westerners Fight Grazing Fee Hike*, 51 CONG. Q. WKLY. REP. 2389, 2389 (1993).

and other western senators successfully passed through the Senate an amendment to the 1994 DOI appropriations bill that would have placed a one-year moratorium on spending for Rangeland Reform '94 to allow time for Congressional hearings on the matter.<sup>175</sup> The House rejected the Dominici amendment, and a Senate filibuster of the House appropriations bill appeared likely to prevent the \$13.3 billion bill from passing on time.<sup>176</sup> Senator Harry Reid (D-NV) brokered a compromise to the impasse, which passed in the House, but failed in the Senate following a three-week filibuster of the DOI appropriations bill led by Senator Dominici.<sup>177</sup> Faced with the prospect of a shut-down of DOI if the appropriations bill was not passed, Secretary Babbitt announced on October 28, 1993 that he would bypass Congress and move ahead with his original Rangeland Reform '94 plan.<sup>178</sup> The controversy finally ended on November 9, when the Senate passed the appropriations bill without the Reid compromise terms or Dominici's amendment, and on November 11, the bill was signed by President Clinton.<sup>179</sup> Attempts to legislatively override Secretary Babbitt's range reform plans had failed for the time.

---

175. See Catalina Camia, *Senate Votes to Block Increase in Grazing Fees Next Year*, 51 CONG. Q. WKLY. REP. 2449 (1993).

176. See Catalina Camia, *A Chronology*, 51 CONG. Q. WKLY. REP. 3113 (1993).

177. See Catalina Camia, *Grazing Fee Filibuster Continues, Bottling Up Interior Spending*, 51 CONG. Q. WKLY. REP. 2875 (1993).

178. See Catalina Camia, *The Filibuster Ends; Bill Clears; Babbitt Can Still Raise Fees*, 51 CONG. Q. WKLY. REP. 3112, 3113 (1993). The "Reid Compromise," a result of very close collaboration with Secretary Babbitt, called for enacting most of the provisions that Babbitt had proposed to implement administratively through Rangeland Reform '94. See *Range Accord Contains Most of Babbitt's Plan*, 18 PUB. LANDS NEWS 2 (1993). It provided for a smaller increase in grazing fees to \$3.45 per AUM over three years, allowed ranchers to continue to retain ownership of current water development projects or other improvements made on public rangeland, but required the relinquishment of ownership of any future projects, and imposed a 20% surcharge on ranchers who subleased their grazing permits. See Catalina Camia, *The Grazing Fee Plan*, 51 CONG. Q. WKLY. REP. 2724 (1993). The Reid Compromise also required the Interior and Agriculture Departments to impose a one-year moratorium on examining the possibility of tying the determination of the duration and size of a rancher's grazing permit to his record of environmental stewardship. See *Babbitt, Hill Dems Agree on Grazing Fees, Range Policy*, 18 PUB. LANDS NEWS 1, 3 (1993).

179. See Department of Interior and Related Agencies Appropriations Act of 1994, Pub. L. No. 103-138, Nov. 11, 1993; see also *Westerners Defeat Babbitt Range Policy—Or Do They?*, PUB. LANDS NEWS 3 (Nov. 25, 1993).

C. *Secretary Babbitt's Decision to Further Integrate Western Interests*

Although he maintained full authority to implement his new grazing policies administratively, Secretary Babbitt emerged from the acrimonious legislative battle with an increased sensitivity to western interests.<sup>180</sup> Common complaints to the initial proposed rule were: it was unnecessary because the current management regime was working;<sup>181</sup> it was a disincentive for good stewardship; it would have a major negative impact on rural western communities; it would result in "takings" of private property; and finally, that it resulted from a policy-making process that had excluded westerners.<sup>182</sup> In the West, a groundswell of opposition to Rangeland Reform '94 led some ranchers to proclaim the arrival of a "second Sagebrush Rebellion."<sup>183</sup> Rejecting a largely top-down approach to grazing reform, Secretary Babbitt cautiously promised to consult more closely with western interest groups before publishing the next round of proposed grazing regulations in April 1994, noting that: "We have listened and we have learned a great deal. . . . I am now committed to an even more inclusive process—one involving elected officials, ranchers, environmentalists, and others."<sup>184</sup>

---

180. See *Westerners Defeat Babbitt Range Policy*, *supra* note 179; see also Gosnell, *supra* note 17, at 30.

181. See 60 Fed. Reg. 9894, 9906 (1995).

182. See *id.* at 9895; see also Gosnell, *supra* note 17, at 31.

183. Steve Hinchman, *Turmoil on the Range: Rancher's Clout Drives Grazing Reform in New Directions*, HIGH COUNTRY NEWS, Jan. 24, 1994, at 5. The first "Sagebrush Rebellion" occurred during the early 1980s, beginning in Nevada and quickly spreading to several western states. See Donald Snow, *The Silence of Leaving it Alone*, NORTHERN LIGHTS, Winter 1994, at 10. The movement opposed the increased control of public lands by the federal government with the passage of numerous environmental laws in the 1970s. See *id.* The "rebels," among whom President Reagan numbered himself, argued for equal footing for eastern and western states with regard to federal land ownership. See *id.* They supported the wholesale transfer of ownership of federal lands in the West to the states. See *id.* The Sagebrush Rebellion suffered defeat in the courts and in the political arena, with those favoring commodity interests on western lands eventually migrating to the "Wise Use" movement. See *id.* at 11.

184. Camia, *supra* note 178.

*D. The Colorado Rangeland Reform Working Group*

Secretary Babbitt took an aggressive approach to fulfilling this promise. In mid-November 1993, he began a three month consultation process with western interest groups in Arizona, Colorado, Idaho, Nevada, New Mexico, Oregon, Utah, and Wyoming, promising public hearings in each of the states.<sup>185</sup> He also announced that he was easing off the strict bureaucratic controls he had first proposed and scrapped his plans for mandatory national range standards and guidelines.<sup>186</sup> In a move reminiscent of Ferry Carpenter's "Home Rule on the Range" slogan,<sup>187</sup> Secretary Babbitt announced that: "Those closest to the land, those who live on the land, are in the best position to care for it."<sup>188</sup>

In Colorado, Secretary Babbitt met with a group of ranchers, environmentalists, and state and local elected officials at the invitation of Colorado Governor Roy Romer.<sup>189</sup> The Colorado Rangeland Reform Working Group ("Colorado Group") was formed by Governor Romer in November 1993 to make recommendations to DOI on grazing fees and public rangeland reform.<sup>190</sup> The Colorado Group had a uniquely non-confrontational approach to range reform. Ken Spann, a leading rancher in the group, noted that "the future of our industry is at stake in how this is resolved,"<sup>191</sup> and that

---

185. See Hinchman, *supra* note 183.

186. See *id.*

187. See *supra* note 144 and accompanying text.

188. HELVARG, *supra* note 6, at 425.

189. See Tom Kenworthy, *Babbitt Announces Plan to Create Local "Councils" to Manage Federal Rangelands*, WASH. POST, Feb. 15, 1994, at A5.

190. The genesis of the Colorado Group concept can be traced to Joe Kasza and Reeves Brown, President and Executive Vice-President respectively of the Colorado Cattlemen's Association, who suggested in a letter to Governor Romer that such a group be formed. See Letter from Joe Kasza, President, Colo. Cattlemen's Association, and Reeves Brown, Executive Vice-President, Colo. Cattlemen's Association, to Roy Romer, Governor of Colo. 2 (Oct. 27, 1993) (on file with author). The men suggested that the "entire issue of federal range management policies be handed to a group of moderate broad-thinking citizens who represent the many complicated facets of this issue." *Id.* They noted: "By soliciting the assistance of such a forum, the public will receive a consensus management recommendation that accounts for all interests equitably instead of a proposal driven by political and emotional agendas." *Id.* They then suggested a number of individuals from Colorado who might be effective in a working group, several of whom were ultimately chosen by Governor Romer. See *id.*

191. See Hinchman, *supra* note 183, at 6.

We need to take a longer term view. . . . It seems to me that the most effective way to make real progress with the conditions on the ground and real progress in converting the West into a society that will work together for its own benefit, is to take the controversy out of it.<sup>192</sup>

Secretary Babbitt was so impressed by his initial meeting with the Colorado Group that he agreed to meet with them every week over the following two months.<sup>193</sup> These meetings were used by DOI to modify Rangeland Reform '94 before publishing a second set of draft regulations in April 1994.<sup>194</sup> Between the weekly meetings with Secretary Babbitt, members of the Colorado Group frequently met in subgroups and in teleconferences to discuss issues, develop issue papers, and formulate recommendations.<sup>195</sup> Governor Romer recruited the members of the Colorado Group from two different existing range reform working groups, each of which had considerable experience collaborating on grazing issues.<sup>196</sup>

The first group, the Colorado Resources Roundtable, was organized in 1992 and is composed of environmentalists and ranchers who believe that "structured, rational discussion of normally contentious issues such as property rights, agricultural subdivision, and water rights, can lead to a mutual respect and better understanding of the issues."<sup>197</sup> The group's bimonthly meetings are premised on: (1) a foundation of trust-building and mutual understanding of various individuals' positions on issues and; (2) a mission of developing "statements of consensus" about

---

192. *See id.*

193. Babbitt, Romer, and the Colorado Group ultimately met nine times in separate sessions in Denver, Grand Junction, and Gunnison. The second meeting was on November 17, 1993, with subsequent meetings on November 24th, December 2nd, 9th, 16th, and 22nd, 1993 and January 5th and 9th, 1994. Issues were grouped into eight categories for discussion in the meetings: (1) public input issues; (2) use issues, including conservation use and non-use; (3) range issues, including range improvement ownership and the range improvement fund; (4) enforcement issues, including lease tenure and unauthorized acts; (5) grazing fees; (6) water issues; (7) subleasing issues; and (8) miscellaneous other issues. *See COLORADO RANGELAND REFORM WORKING GROUP, GROUP WORKING PAPERS 3* (1993) (on file with author) [hereinafter "Working Papers"].

194. *See* Interview with William Riebsame, Professor of Geography, University of Colorado, in Boulder, Colo. (Oct. 26, 1996) (audiotape on file with author).

195. *See id.*

196. *See id.*

197. Gosnell, *supra* note 17, at 19.

natural resource issues which are then made available to public decision makers.<sup>198</sup>

The second group was the Gunnison Group, an alliance formed in 1992 by Gary Sprung, the president of a local environmental group called the High Country Citizen's Alliance, and Bill Trampe, a rancher and former president of the Gunnison County Stockgrowers' Association.<sup>199</sup> The Gunnison Group was concerned with a perceived loss of community resulting from booming residential development.<sup>200</sup> Environmentalists in the group favored keeping ranchers on the land as a way to avoid sprawling development and maintain cultural integrity,<sup>201</sup> while the group's ranchers were willing to place more emphasis on ecosystem management in their operations to satisfy environmental concerns.<sup>202</sup>

In April 1993, the two groups contacted one another in order to discuss Secretary Babbitt's Advance Notice of Proposed Rulemaking for Rangeland Reform. They decided to coordinate a joint proposal for grazing policy reform to present at Secretary Babbitt's Grand Junction town meeting.<sup>203</sup> They had been working together on this proposal for several months when Governor Romer invited them to a meeting with Secretary Babbitt in Denver.<sup>204</sup>

In addition to members from these two groups, the Colorado Group recruited four outside individuals in order to better represent "affected" interests.<sup>205</sup> These included two representatives from national environmental groups and two ranchers from the San Luis Valley in southern Colorado.<sup>206</sup> In all, the group had among its members seven ranchers, seven environmentalists, and two representatives of local government.<sup>207</sup> Additionally, once national attention focused on the group's efforts with Secretary Babbitt, about thirty permanent observers began to attend the

---

198. *See id.*

199. *See id.*

200. *See id.*

201. *See* Clifford, *supra* note 122 and accompanying text.

202. *See* Gosnell, *supra* note 17, at 20.

203. *See supra* note 168 and accompanying text.

204. *See* Interview with William E. Riebsame, *supra* note 194.

205. *See id.*

206. *See* Interview with Thomas A. Kourlis, *supra* note 47.

207. *See* WORKING PAPERS, *supra* note 193, at 1.

group's meetings.<sup>208</sup> These observers represented interests ranging from the Western Governors' Association to the Audubon Society and included representatives from the offices of each of Colorado's congressional delegates.<sup>209</sup>

### *E. The Process of Building Consensus*

The two organizations which formed the Colorado Group had a tradition of forging solutions to local grazing issues through a system of consensus, and had avoided voting on issues whenever possible.<sup>210</sup> Bill Riebsame, a geography professor at the University of Colorado, and a member of the Colorado Resources Roundtable and the Colorado Group, said that in the Colorado Group's meetings, "if we couldn't talk things out and wrestle them to an agreeable solution we just called that no progress and went on to other things."<sup>211</sup> However, Secretary Babbitt wanted to conclude the Group's efforts by mid-January 1994 and given this tight deadline, a few issues had to be voted on in the interest of expediency.<sup>212</sup> Otherwise, the Colorado Group relied entirely on consensus-building.<sup>213</sup> The members hoped that by talking until they fully understood each other's views on an issue, they would develop an understanding and sympathy for one another's views, enabling them to better formulate effective compromises.<sup>214</sup> At the conclusion of the Colorado Group's meetings, Governor Romer wrote Secretary Babbitt that "most members believed that consensus was the appropriate means" to resolve their disputes.<sup>215</sup>

Several other issues addressed by the Colorado Group are discussed below. Unless otherwise noted, the recommendations of the working group were fully implemented in DOI's Rangeland Management Plan, which became effective as law on August 21, 1995.<sup>216</sup> In fact, DOI included the Colorado Group's final report, *Models for Enhanced Community-Based Involvement in Range-*

---

208. *See id.*

209. *See id.*

210. *See* Interview with William E. Riebsame, *supra* note 194.

211. *Id.*

212. *See id.*

213. *See id.*

214. *See id.*

215. Letter from Roy Romer, Governor of Colorado, to Bruce Babbitt, Secretary of the Interior 1 (Jan. 20, 1994) (on file with author).

216. *See* 43 C.F.R. pts. 4, 1780, 4100 (1995).

*land Reform*,<sup>217</sup> in its proposed rule, noting that “[t]he Department agrees with the findings of the group and has attempted to incorporate all key elements of the model for public involvement in this proposed rule.”<sup>218</sup> For the most part, the Colorado Group’s recommendations endured through the rulemaking process and were incorporated in the final Rangeland Management Plan.<sup>219</sup> However, the Colorado Group offered its recommendations as a “Colorado model,” which it recognized might be inappropriate for implementation in other states,<sup>220</sup> and in fact the final rule does offer some alternative public participation models that are potentially more suitable for implementation in states with needs different from those of Colorado’s.<sup>221</sup>

#### IV. THE RECOMMENDATIONS OF THE COLORADO GROUP

##### A. *The Importance of Community and Ecosystem Health*

The most basic issue addressed by the Colorado Group was determining the place of ranchers in the ecosystem. Ranchers argued that “humans are part of ecosystems”<sup>222</sup> and that, therefore, grazing policy should support healthy communities as well as healthy ecosystems.<sup>223</sup> Environmentalists, on the other hand, saw the issue of ecological health determined mainly by the willingness of ranchers and communities to forgo resource extraction in order to maintain the integrity of various elements in the ecosystem, such as predators or native grasses.<sup>224</sup> The Western Governors’ Association had written a letter to Secretary Babbitt stating that it could not support any range reform proposals that did not “result in sustainable, healthy communities” and produce “good stewards on the land that are capable of staying on the land.”<sup>225</sup> In fact, this position was adopted early on

---

217. See COLORADO RANGELAND REFORM WORKING GROUP, COLORADO RANGELAND REFORM PROPOSAL: MODELS FOR ENHANCED COMMUNITY-BASED INVOLVEMENT IN RANGELAND REFORM (1994) (final report of Colorado Working Group submitted to Secretary Babbitt) (on file with author).

218. 59 Fed. Reg. 14,314, 14,317 (1994).

219. See *infra* Part IV.

220. See *id.*

221. See *infra* notes 242-62 and accompanying text.

222. Riebsame, *supra* note 16, at 9.

223. See *id.*

224. See *id.*

225. Letter from Bob Miller, Governor of Nevada and Chairman of the Western

by the Colorado Group, as even the national environmentalists recognized that to some extent it was important to keep people "tied to the land" and to maintain grazing by domestic livestock in order to promote healthy grasslands where native grazing animals no longer exist.<sup>226</sup>

### B. *The Resource Advisory Councils*

Another large issue for the group was, ironically, the one that had received the least attention in the initial Rangeland Reform '94 proposal: the formation of Resource Advisory Councils to replace the Grazing Advisory Boards.<sup>227</sup> Some members of the Colorado Group felt that "[o]perating alone, centralized, top-down, highly structured management, as currently exists . . . will never be able to effectively implement ecosystem management to its full potential. Ecosystem management inherently means direct, local hands-on involvement and collective ownership in the resource decisions being made."<sup>228</sup> However, opponents of local control, including many environmentalists, argued that local control under the Grazing Advisory Board system had created a closed political system in which only the locally powerful ranching interests and BLM personnel had a voice.<sup>229</sup>

The national environmentalists in the Colorado Group felt it was important to recognize the federal public lands as the province of citizens across the United States and not just the local communities and economies that the lands directly support.<sup>230</sup> A compromise on this issue was developed wherein the RACs included among their members representatives from national environmental groups.<sup>231</sup> The Colorado Group recommended that RACs combine decentralized decision-making in order to suit local circumstances, but to do so with "increased involvement by groups representing national concerns such as environmental and

---

Governors' Association, to Bruce Babbitt, Secretary of the Interior, and Mike Espy, Secretary of Agriculture 1 (Oct. 20, 1993) (on file with author).

226. See Colorado Rangeland Reform Working Group, minutes to meeting held at the Governor's Mansion 2 (Nov. 23, 1993) (on file with author); see also Interview with William Riebsame, *supra* note 194.

227. See Interview with William Riebsame, *supra* note 194.

228. Letter from Ken Spann, President of the Gunnison Working Group, to Roy Romer, Governor of Colorado 2 (Dec. 7, 1993) (on file with the author).

229. See Interview with William E. Riebsame, *supra* note 194.

230. See *id.*

231. See 43 C.F.R. § 1784.6-1(c) (1996).

aesthetic protection."<sup>232</sup> However, the final rule muted the impact of the compromise by requiring RAC members to be residents of one of the states within the geographic jurisdiction of their RAC.<sup>233</sup>

The group discussed several methods by which local control could be implemented through the RACs, including: (1) giving them "control over all or some of the actual resource decisions being made" (the "control model"); (2) giving them "shared budgetary responsibility . . . and develop[ing] an appeals process for many decisions made by the resource group" (the "quasi-control model"); or (3) giving them an "oversight role."<sup>234</sup> However, the group ultimately decided to work within the requirements of the Federal Advisory Committee Act ("FACA"),<sup>235</sup> and therefore recommended a BLM district-level advisory role with a process for direct appeal to the Secretary of the Interior.<sup>236</sup>

Acting on this advice, the final rule provided that if members of a RAC unanimously agree that their advice is being "arbitrarily disregarded," they may appeal to the Secretary of the Interior, who will respond within sixty days.<sup>237</sup> However, this process does not give the RACs any direct authority over the BLM. As FACA-chartered committees, RACs cannot oblige the BLM to implement the RACs' advice.<sup>238</sup> Rather, the basic purpose of the RACs is to "foster conflict resolution through open dialogue and collaboration instead of litigation and bureaucratic appeal."<sup>239</sup>

232. Riebsame, *supra* note 16, at 27.

233. See 43 C.F.R. § 1784.6-1(c) (1996).

234. Letter from Ken Spann, for Gunnison Working Group, to Governor Roy Romer 3 (Dec. 7, 1993).

235. 5 U.S.C. app. §§ 1-15 (1994). Congress passed FACA in 1972 to govern the activities of federal advisory commissions. See 5 U.S.C. app. 1, § 2(a) (1994). FACA-chartered committees "are usually comprised of private citizens who are asked to provide an agency with advice or recommendations." David Getches, *Colorado River Governance: Sharing Federal Authority as an Incentive to Create a New Institution*, 68 U. COLO. L. REV. 573, 654 n.410 (1997). Under FACA, advisory committees must file detailed charters (§ 9(c)), give advance notice in the Federal Register of any meetings (§ 10(a)(2)), and hold all meetings in public (§ 10(a)(1)). For more on the RACs' compliance with FACA, see Dover A. Norris-York, Comment, *The Federal Advisory Committee Act: Barrier or Boon to Effective Natural Resource Management?*, 26 ENVTL. L. 419, 433-39 (1996).

236. See COLORADO RANGELAND REFORM WORKING GROUP, *supra* note 217, at 4-5.

237. See 43 C.F.R. § 1784.6-1(i) (1996).

238. See Norris-York, *supra* note 235, at 436.

239. *Id.* at 435.

The Colorado Group recommended that the RACs represent, in a balanced manner, “[a]ll interests, uses, and values . . . to the extent possible.”<sup>240</sup> This recommendation was implemented more specifically to require each RAC to be formed with equal (one-third) representation from each of the following three categories of interest groups: (1) those holding grazing permits within the area for which the RAC is organized, commodities industries, and off-road vehicle recreational users of public lands; (2) nationally or regionally recognized environmental groups, wild horses and burros interest groups, historical and archeological interest groups, and recreational interest groups; and (3) elected public officials, representatives of state natural resources management agencies, Native American tribes, natural science scientists, and representatives of the public at large.<sup>241</sup>

Under the new regulations, state BLM directors may choose from one of three RAC models,<sup>242</sup> or under rare circumstances decide not to implement a RAC for a certain region.<sup>243</sup> All three models have certain similarities: each must be formed with equal representation from the three categories of interest groups above.<sup>244</sup> The Colorado Group recommended that RAC members undergo training on range ecosystem awareness before serving on the RACs,<sup>245</sup> and this proposal was implemented in the final rules for all RACs.<sup>246</sup> RACs may not provide advice concerning personnel actions within the BLM or regarding the allocation and expenditures of BLM funds.<sup>247</sup> Terms of service on RACs are generally limited to two years,<sup>248</sup> although reappointments are possible, and members must possess “experience or knowledge of the geographical area under the purview of the advisory commit-

---

240. COLORADO RANGELAND REFORM WORKING GROUP, *supra* note 217, at 4.

241. *See* 43 C.F.R. § 1784.6-1(a)(1) (1996).

242. *See id.* § 1784.6-2(a)(1)-(a)(3).

243. *See id.* § 1784.6-1(a) (providing that RACs will be established for all BLM lands unless there is insufficient interest in participation to ensure effective collaboration or unless the BLM lands are too remote with respect to potential populations of RAC participants to ensure effective participation).

244. *See id.* § 1784.6-1(c).

245. *See* Interview with William Riebsame, *supra* note 194.

246. *See* 43 C.F.R. § 1784.6-1(f) (1996).

247. *See id.* § 1784.6-1(b). A RAC may, however, provide advice on the allocation or expenditure of funds for the “purposes of long-range planning and the establishment of resource management priorities.” *Id.*

248. *See id.* § 1784.3(a).

tee.”<sup>249</sup> Finally, RACs are limited to ten to fifteen members<sup>250</sup> who are nominated by the governor of their state and approved by the Secretary of the Interior.<sup>251</sup> Some distinguishing characteristics of the three RAC models are discussed below.

Model A is based heavily on the recommendations of the Colorado Group. It requires fifteen RAC members, and implements Rangeland Resource Teams (“RRT”)<sup>252</sup> and Technical Review Teams (“TRT”).<sup>253</sup> Model A RACs must approve their recommendations to the BLM with a 60% vote, and recommendations also require approval by at least three of the five members from each of the three categories of interest groups.<sup>254</sup> Hence it is impossible for two of the three categories of interest groups to pass a recommendation without 60% agreement from the third category’s members.

The Model B RAC requirements are based on comments from citizens in Wyoming<sup>255</sup> and are similar to those of Model A, except that recommendations to the BLM must be approved by an 80% vote, with a simple majority in each interest group,<sup>256</sup> and RRTs may be larger, with as many as ten members instead of five.<sup>257</sup>

---

249. *Id.* § 1784.2-1(b).

250. *See* Federal Land and Policy Management Act § 309(a), 43 U.S.C. § 1739(a) (1994) (requiring the Secretary to establish Advisory Councils of not less than 10 and no more than 15 members).

251. *See* 43 C.F.R. §1784.6-2(a)(1)-(a)(3) (1996).

252. These five-member, multiple-interest teams are formed by the RAC or upon a petition by local citizens and are intended to provide input to the RAC on local level issues within the RAC’s geographic region. *See id.* §1784.6-2(a)(1)(iv)(A). The Colorado Group report indicated that “[i]t is expected that these community-based Rangeland Resource Teams will have a true eco-system focus. With time and experience, this model could be organized around eco-regions rather than according to arbitrary land ownership and federal management boundaries.” COLORADO RANGELAND REFORM WORKING GROUP, *supra* note 217, at 6. It also recommended that a “substantial portion” of any revenues generated through increased grazing fees be allocated to support these teams and their activities at the local level. *See id.* Finally, it recommended that “[i]n order to have credibility and to ensure that both community and public interests are represented, Rangeland Resource Teams should be allowed to spring up in as small an area as a single allotment.” *Id.* at 6.

253. These teams of federal employees and paid consultants may be formed at the request of the RAC, RRT, or BLM in order to “gather and analyze data and develop recommendations to aid the decisionmaking process.” 43 C.F.R. § 1784.6-2(a)(1)(iv)(D). The teams terminate at the completion of their assigned task. *See id.* §1784.6-2(a)(3)(iv)(A).

254. *See id.* § 1784.6-2(a)(1)(iii).

255. *See* 60 Fed. Reg. 9894, 9896 (1995).

256. *See* 43 C.F.R. §§ 1784(a)(2)(iii), 1784.6-1(h) (1996).

257. *See id.* § 1784.6-2(a)(2).

Additionally, whereas the jurisdiction of the Model A RACs coincides with existing BLM districts or ecoregion boundaries, the jurisdiction of the Model B RACs is either statewide or on an ecoregion basis.

Model C RAC requirements serve as a catch-all for states that require more flexibility in their implementation of the RAC concept than can be achieved through Models A or B.<sup>258</sup> Model C RACs accommodate the formation of whatever type or number of local teams (such as RRTs) and TRTs desired, and C RACs can be formed along state, ecoregional, or BLM district boundaries.<sup>259</sup> Like Models A and B, the C RACs' membership is equally divided among the three interest group categories; however, C RACs may have as few as ten members.<sup>260</sup> C RACs must determine their own quorum and voting requirements,<sup>261</sup> but the regulation allows a simple majority approval of each of the interest category members in order to issue recommendations to the BLM.<sup>262</sup>

### C. Grazing Fees

The Colorado Group ultimately decided not to formulate a recommendation on grazing fees for DOI,<sup>263</sup> however, their discussion on this issue is insightful because DOI's final range reform rules also failed to address the issue of fees. DOI explained that it had "decided not to promulgate the fee increase provision of the proposed rule in order to give the Congress the opportunity to hold additional hearings" on the subject,<sup>264</sup> and the Colorado Group's environmentalists agreed that adjusting the grazing fee structure was a political problem that was not worth tackling from an environmental standpoint.<sup>265</sup>

The national environmentalists had initially felt that campaigning for an increase in grazing fees would be politically expedient because the 104th Congress was strongly in favor of reducing government subsidies and increasing user-pay sys-

---

258. See *id.* § 1784.6-2(a)(3).

259. See *id.* § 1784.6-2(a)(3)(i), (iv).

260. See *id.* § 1784.6-2(a)(3)(ii).

261. See *id.* § 1784.6-2(a)(3)(iii).

262. See 43 C.F.R. § 1784.6-2(a)(3)(iii) (1996).

263. See Interview with William Riebsame, *supra* note 194.

264. 60 Fed. Reg. 9894, 9899.

265. See Interview with William E. Riebsame, *supra* note 194.

tems.<sup>266</sup> They hoped increased fees would reduce some of the grazing pressure on range ecosystems.<sup>267</sup> In fact, there was no evidence that an increase in grazing fees would lead to a decrease in the number of cattle on the public range, although the Western Governors' Association argued that it might "cause small operations to be absorbed into larger ones, with the attendant disruption to rural communities."<sup>268</sup> In other words, given the marginal nature of small ranching operations, an increase in grazing fees would cause smaller operations to go out of business, selling their grazing permits to larger operations with greater economies of scale.

Secretary Babbitt provided the Colorado Group with a proposal for a two-tiered fee system, with smaller operators having lower fees than larger operators and with an overlapping incentive system for good environmental stewardship practices.<sup>269</sup> In the end, however, the Colorado Group decided not to make a formal recommendation on fees, feeling that the issue would be best resolved in the political arena, not in a single state's working group and that fees were not an environmental issue.<sup>270</sup> Bill Riebsame noted that "like entrance fees for national parks or rates of farm subsidies, grazing fees are not set by market competition but by political compromise."<sup>271</sup> However, the Colorado Group did come to an informal conclusion that administrative costs, land quality, and an individual rancher's ability to pay should all be considered in setting grazing fees.<sup>272</sup>

#### D. Water Rights

One of the most contentious issues that the Colorado Group addressed was whether ranchers should be entitled to water rights for the water resources they develop on public lands.<sup>273</sup>

---

266. *See id.*

267. *See id.*

268. Letter from Bob Miller to Bruce Babbitt and Mike Espy, *supra* note 225, at 4.

269. *See* Letter from Bruce Babbitt, Secretary of the Interior, to the individual members of the Colorado Rangeland Reform Working Group (Nov. 23, 1993) (on file with author).

270. *See* Interview with William Riebsame, *supra* note 194.

271. Riebsame, *supra* note 16, at 9.

272. *See* Interview with William Riebsame, *supra* note 194.

273. *See id.*

Since 1980, ranchers have been able to receive state water rights to waters they develop on the public range.<sup>274</sup> Ranchers were in favor of maintaining the system of awarding water rights, because the rights became part of the assessed value of their ranches and therefore were crucial to securing loans to finance their operations.<sup>275</sup> They asserted that "further water development for livestock purposes on public lands would be difficult under a rule where the United States held title to the water right."<sup>276</sup>

Environmentalists felt that the ranchers were motivated by the "non-agricultural speculative value of water,"<sup>277</sup> that is, the value of the water rights to the rancher once he or she decided not to ranch anymore.<sup>278</sup> They did not mind affording a guarantee of the water rights to the holder of the grazing permit *ad infinitum*, but once a rancher stopped using his or her permit, the environmentalists wanted to keep the water source on the public land.<sup>279</sup> Environmentalists pointed out that by maintaining water rights for the public, future ranchers who might take on the grazing rights and all other future users of the public land would be assured a source of water without having to pay the inflated prices a private owner might charge.<sup>280</sup> The Colorado Group ultimately recommended that future water development projects not confer water rights.<sup>281</sup> This recommendation was followed in the final rule, which provides that any water rights acquired after August 21, 1995, for the purposes of grazing livestock "shall be acquired, perfected, maintained, and administered in the name of the United States."<sup>282</sup>

---

274. See Letter from Ken Salazar, Executive Director, Colo. Dep't of Natural Resources, to Trish Bangert, Deputy Attorney Gen., Colo. 1 (Jan. 7, 1994) (on file with author).

275. See Interview with William Riebsame, *supra* note 194.

276. Letter from Ken Salazar to Trish Bangert, *supra* note 274, at 2.

277. Interview with William Riebsame, *supra* note 194.

278. *Id.* In essence, the environmentalists' position was "we want you to stay in ranching, and you want to stay in ranching . . . [therefore] we don't want you to have a property right that has other value." *Id.*

279. See *id.*

280. See Steve Hinchman, *Grazing Reform: A Plan to Chew On*, HIGH COUNTRY NEWS, Apr. 4, 1994 at 3.

281. See Interview with William E. Riebsame, *supra* note 194.

282. 43 C.F.R. § 4120.3-9 (1996).

*E. Permit Tenure, Conservation Use, and Suitability*

Two other controversial proposals in Secretary Babbitt's initial Rangeland Reform '94 plan concerned permit tenure and conservation use.<sup>283</sup> Under previous DOI rules, the duration of grazing permits was fixed at ten years. Secretary Babbitt's proposal called for tenure of possibly lesser durations, with only those ranchers exhibiting excellent environmental stewardship afforded the ten year term. Secretary Babbitt decided to table this proposal before the Colorado Group could discuss it, as it evoked a storm of controversy from ranchers who relied on fixed tenure arrangements to value their land and obtain financing.<sup>284</sup>

Conservation use refers to the practice of defining the "active use" of a permit to include conservation purposes other than grazing. The Nature Conservancy, for instance, has purchased ranches in order to retire grazing permits, and it owns ranches on which it allows some level of sustainable grazing.<sup>285</sup> Some members of the Colorado Group felt that conservation use permits would be detrimental to grasslands which needed some level of grazing to flourish, and Governor Romer tabled the issue for later referral to Secretary Babbitt. DOI ultimately included conservation use in its final rules.<sup>286</sup>

One issue that was not discussed in the proposed rules, but which many members of the Colorado Group felt was important, was the determination of suitability of public lands for grazing.<sup>287</sup> Such a process would involve a "hard-nosed ecological survey" to determine which BLM allotments ought not be grazed.<sup>288</sup> Some felt that 10% or more of the BLM's current grazing permits were on lands which were simply unsuitable for grazing.<sup>289</sup> The Colorado Group discussed how these permits might be taken from use in a process similar to that employed by the Base Closure

---

283. See Interview with William E. Riebsame, *supra* note 194.

284. See *id.*

285. See, e.g., DAGGET, *supra* note 63, at 13-23.

286. See 43 C.F.R. § 4100.0-5 (1996). Note that DOI's new definition of "active use" to include "conservation use" has been successfully challenged, along with several other provisions of the new rules, in *Public Lands Council v. Babbitt*, 929 F. Supp. 1436 (D. Wyo. 1996), although the case is on appeal. For a description of this case and its ramifications, see Pendery, *supra* note 56, at 601-05.

287. See Interview with William E. Riebsame, *supra* note 194.

288. See *id.*

289. See *id.*

Commission to retire military bases, but none of these discussions were incorporated into the final proposal to Secretary Babbitt.<sup>290</sup>

#### F. Range Management Standards and Guidelines

Of equal significance to the development of the RACs under Rangeland Reform '94 was the implementation of ecosystem-based range management standards<sup>291</sup> and guidelines.<sup>292</sup> These standards and guidelines will ensure that the RACs and the BLM take environmental concerns into consideration by "graft[ing] the emerging science of ecosystem management<sup>293</sup> onto BLM's traditional livestock focused range management."<sup>294</sup> Standards and guidelines will be developed for each state in consultation with the state's RAC(s), Indian Tribes, and other state and federal land management agencies.<sup>295</sup> These standards must conform within broad, but stringent, federal "[f]undamentals of rangeland health,"<sup>296</sup> and must address watershed functions, water quality, habitat for endangered species, habitat for native plant and animal species, stream channel morphology, riparian and wetland functions, and a host of other ecological issues.<sup>297</sup> If

---

290. *See id.*

291. Standards are "descriptions of the desired condition of the biological and physical components and characteristics of rangelands." *See* BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF INTERIOR, STANDARDS FOR RANGELAND HEALTH AND GUIDELINES FOR GRAZING MANAGEMENT FOR BLM LANDS IN UTAH 3 (1997). Standards are measurable and attainable; comply with applicable federal and state statutes, policies and directives; and establish "goals for resource condition and parameters for management decisions." *Id.*

292. Guidelines are "management approaches, methods, and practices that are intended to achieve a standard." *Id.* They "typically identify and prescribe methods of influencing or controlling specific public land uses" and "are developed and applied consistent with the desired [land] condition." *Id.*

293. "Ecosystem management is an approach to natural resources management focusing on protecting biological diversity, amenities, aesthetics, and recreation while allowing for sustainable development." Pendery, *supra* note 56, at 516.

294. *Id.* at 518. Pendery, who worked as a range scientist for the Department of Agriculture for ten years before attending law school, has written a comprehensive analysis of Rangeland Reform '94's approach to standards and guidelines. He concludes that "depending on how rigorously—and for how long—the standards and guidelines are implemented, they could lead to dramatic changes in livestock grazing over a vast portion of the West . . . [and] improve the ecological health of BLM rangelands . . . and probably [be] of benefit to many ranchers in the long term." *Id.* at 607-08.

295. *See* 43 C.F.R. § 4180.2(a)-(b) (1996).

296. *Id.* §§ 4180.1, 4180.2(b).

297. *See id.* § 4180.2(d).

a state's standards and guidelines were not implemented by February 12, 1997, the regulation called for the implementation of national fallback standards and guidelines, which would be effective until the state completes its own set.<sup>298</sup> The first function of many state RACs has been to develop a recommendation for their state's standards and guidelines.

#### V. THE AFTERMATH OF A COLLABORATIVE DECISION MAKING EXPERIMENT

Before addressing the merits of the Colorado Group's RAC approach, some readers may be interested in the events that transpired between the Colorado Group's meetings with Secretary Babbitt and DOI's publication of the final rule in February 1995. In February 1994, one month after his last meeting with the Colorado Group, Secretary Babbitt released portions of a new draft grazing proposal based on the Colorado Group's recommendations piecemeal to the press in order to build support for its various components.<sup>299</sup> A copy of the entire draft regulation, which had been circulating throughout federal offices in Washington, D.C., was subsequently leaked to the *Washington Post*. The *Post* published a description of the proposal on March 4, 1994,<sup>300</sup> leading to yet another round of criticism of Secretary Babbitt's efforts at grazing reform.

Environmentalist opponents of the Colorado RAC model claimed that its provision for direct appeal to the Secretary would intimidate professional land managers, "bog down" the Secretary's office, and should not be implemented without a pilot program.<sup>301</sup> Others were concerned about the powerful role of western governors in nominating individuals for membership on the RACs.<sup>302</sup> Some noted that the model might work in Colorado, but fail in other western states where opinions about grazing are less varied.<sup>303</sup> They pointed out that it might be difficult to find residents of small ranching communities who would be willing to

---

298. See *id.* § 4180.2(f).

299. See Tom Kenworthy, *Babbitt Announces Plan to Create Local Councils to Manage Federal Rangelands*, WASH. POST, Feb. 15, 1994, at A5.

300. See Tom Kenworthy, *Revised Grazing Proposal Makes Concessions to Livestock Interests*, WASH. POST, Mar. 4, 1994, at A3.

301. See *id.*

302. See Kenworthy, *supra* note 299.

303. See *id.*

speak out in support of the necessary changes.<sup>304</sup> The vice-president of the National Audubon Society pointed out that “[l]ocal control is what we’ve had for the past 60 years under the Taylor Grazing Act . . . and look what trouble we’re in.”<sup>305</sup> Lastly, some environmentalists felt Secretary Babbitt had backed away from giving the BLM true authority to cut grazing allotments and stop grazing on unsuitable lands.<sup>306</sup> They believed that the consensus-building approach would become yet another way to stall the tough decisions that needed to be made.<sup>307</sup>

In Congress, Senator Dominici objected to giving seats on the RACs to those who lived far from the rangelands in question, saying that such a plan “flies in the face of local control.”<sup>308</sup> Even Secretary Babbitt’s old Democratic allies opposed the plan.<sup>309</sup> Senator Reid and the three other Democrats who hammered out the Reid Compromise<sup>310</sup> viewed the new plan as a capitulation by the Clinton Administration to the livestock industry and a betrayal of the deal they had struck with Secretary Babbitt in 1993.<sup>311</sup> They criticized Secretary Babbitt in an open letter, writing that “Babbitt’s been negotiating with people who never had any intent of accepting [a] compromise.”<sup>312</sup> Nonetheless, Secretary Babbitt remained committed to his plan, stating “I strongly believe the Colorado model is conceptually correct . . . I’m . . . absolutely certain that [the RACs] are the only way to open a new chapter in rangeland management.”<sup>313</sup>

Secretary Babbitt followed through with extensive public review of his administrative reform, releasing a draft proposal in late March 1994, followed by forty-eight simultaneous public

---

304. See *What Is “Local Control?”* PUB. LAND POL’Y, June 17, 1994, at 547.

305. *Id.*

306. See *id.*

307. See *id.*

308. *Id.*

309. See Letter from Rep. George Miller, Chairman, Comm. on Natural Resources, U.S. House of Representatives, Sen. Harry Reid, U.S. Senate, Mike Synar, Chairman, Subcomm. on Env., Energy and Natural Resources, U.S. House of Representatives, and Bruce F. Vento, Chairman, Subcomm. on Nat. Parks, Forests, and Pub. Lands, U.S. House of Representatives, to the Honorable Bruce Babbitt, Secretary of the Interior 1 (Mar. 4, 1994) [hereinafter Miller Letter] (on file with author).

310. See *supra* note 177 and accompanying text.

311. See Miller Letter, *supra* note 309, at 2, 5; see also Tom Kenworthy, *Four Lawmakers Fault Babbitt’s Grazing Plan*, WASH. POST, Mar. 8, 1994, at A3.

312. Kenworthy, *supra* note 311.

313. *Id.*

hearings in ten states and Washington, D.C., on June 8, 1994.<sup>314</sup> The hearings were predictably acrimonious. Ranchers declared that every regulation was directed against them and that the program declared a new "War on the West."<sup>315</sup> To defuse some of the conflict, Secretary Babbitt announced in December 1994 that he would drop his plan's proposed fee increase and delay implementation of the plan for six months in order to give the newly elected 104th Congress time for further discussion.<sup>316</sup> Over 38,000 comments were received from the public and considered by DOI before it published its final rule.<sup>317</sup> After a protracted battle with Congress, in which both the House and the Senate attempted unsuccessfully to legislatively override Secretary Babbitt's regulations, the new rules finally went into effect on August 21, 1996.<sup>318</sup> Despite the dire predictions of some ranchers in the West, on August 21, the *Colorado Daily Sentinel* from Grand Junction summed up the events of the day: "The earth did not yawn today and swallow the rural communities of the West. Reports of raining frogs remained nonexistent west of the 100th meridian. And the rivers hereabouts are filled with water, not blood."<sup>319</sup> To date, this observation still rings true, and range reform and the RACs appear to be operating successfully.

Thus far, twenty-three RACs have been implemented in the following twelve states: Alaska, Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, North Dakota, Oregon, and Utah.<sup>320</sup> Additionally, Wyoming had a RAC, but its charter

---

314. See Steve Hinchman and Donica Mensing, *The West's Grazing War Grinds On*, HIGH COUNTRY NEWS, June 27, 1994, at 5.

315. *Id.*

316. See *The Politics of Grazing*, WASH. POST, Jan. 2, 1995, at A18.

317. See 60 Fed. Reg. 9894 (1995).

318. See *Senate Panel Wants to Move Quickly on New Grazing Policy*, PUB. LANDS NEWS, July 6, 1995, at 2; *Ranchers Pursue All Options; Ask Court to Stop BLM Plans*, PUB. LANDS NEWS, Oct. 12, 1995, at 4; *Range Provision Dropped from Budget; GOP Looks to Dominici*, PUB. LANDS NEWS, Nov. 23, 1995, at 4; Bob Beneson and Alan Greenblatt, *Reconciliation: Provisions on Parks, Grazing Win Approval from Panels*, 53 CONG. Q. WKLY. REP. 2892 (1995); Bob Beneson, *Appropriations: Mining Issue Prompts House to Return Interior Bill*, 53 CONG. Q. WKLY. REP. 2987 (1995); John Cushman, *Grazing Legislation*, N.Y. TIMES, Mar. 22, 1996, at A2.; Kim Archer, *House Panel Brings Public Grazing Plan Closer to Reality*, Dow Jones News Service, Apr. 26, 1996, available in Westlaw ENVNEWS Database.

319. See Bob Armstrong, Remarks to the National Cattlemen's Association, San Antonio, Tex. (Jan. 29, 1996) (Trans. available at <<http://www.blm.gov/nhp/news/speech/sp960129.htm>>) (quoting from the *Daily Sentinel*).

320. See Telephone Interview with Karen Slater, Intergovernmental Group Manager, BLM, Wash. D.C. (Oct. 14, 1997). To be more specific, Alaska, Arizona,

expired in September 1997 following an "agreement to disagree" between the governor and the Secretary concerning the function of the RAC and the Secretary's discretion to disapprove the governor's nominations for RAC membership.<sup>321</sup> There have not been any recent discussions to recharter a RAC for the state.<sup>322</sup> Nonetheless, prior to the termination of its charter, the Wyoming RAC was able to finish its recommendation for Wyoming's standards and guidelines, which were approved by the Secretary.

In some states, such as Wyoming and Colorado, the state governor has played a heavy role in nominating RAC members.<sup>323</sup> However, under FACA the Secretary must ultimately approve nominations,<sup>324</sup> which means that the state governors cannot dictate appointments to the Secretary.<sup>325</sup> The Secretary has tried to appoint individuals who will make the RACs the most "effective functioning body" possible and has been watchful to ensure that individuals will in fact represent the category of interest for which they are nominated.<sup>326</sup> However, DOI gives state nominations careful consideration because it believes states are in the best position to assess appropriate representation for the issues which are of importance to them.<sup>327</sup> Nonetheless, those who have worked with Secretary Babbitt in this process indicate that he will "turn down [nominees] if he feels other candidates would bring a better mix of interests to the Council or better represent an interest group."<sup>328</sup>

With the exception of the problems in Wyoming, the first RACs in Colorado and other states appear to be operating effectively.<sup>329</sup> They have been attempting to develop a common

---

New Mexico, and Utah each have one RAC; North and South Dakota share a RAC; and California, Colorado, Idaho, Montana and Oregon each have three. *See id.* The Alaska, North Dakota, and South Dakota RACs have 12 members; the Utah RAC has 14 members; the Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, and Oregon RACs have 15 members; and California has two RACs with 12 members and one with 15 members. *See id.*

321. *See id.*

322. *See id.*

323. *See id.*

324. *See id.*

325. *See* Telephone Interview with Karen Slater, *supra* note 320.

326. *See id.*

327. *See id.*

328. Telephone Interview with Sheri Bell, Public Affairs Officer, Colo. BLM Headquarters (Oct. 8, 1997); *see also* Telephone Interview with Karen Slater, *supra* note 320.

329. *See* Rick Keister, *Multicultural Grazing Boards off to a Good Start*, HIGH

language and have undergone basic training on rangeland ecosystems.<sup>330</sup> At least in Colorado, participants note that during the RAC meetings they “forget which group [they] represent.”<sup>331</sup> Even in Nevada, where grazing issues have provoked violence against federal officials, the RACs have moved on from a “chaotic and tedious” start, to begin to develop a sense of a common purpose.<sup>332</sup> One RAC took a raft trip down the Rio Grande, opening the eyes of its ranching members, who had never rafted, to the recreational benefits of the river.<sup>333</sup>

The RACs spent much of their first two years in operation formulating recommendations for state standards and guidelines on rangeland health<sup>334</sup>—a process which provided a proving ground for their collaborative mechanisms. With the exception of California and New Mexico, which are still awaiting public input on their draft EISs for range standards and guidelines, all of the western states have completed their own standards and guidelines.<sup>335</sup> They have now moved on to more specific natural resource issues such as wild and scenic river protection, energy development, recreation, and wilderness issues. Arizona’s RAC, for instance, has created a recreation RRT which has been working on developing a statewide strategic plan for managing recreation on public lands.<sup>336</sup> California’s RACs have been examining a similar issue—trying to determine whether to charge user fees for recreation on portions of California’s public lands—as well as examining close beach land issues and off-highway users.<sup>337</sup> Colorado’s RACs have addressed the issues of wilderness designation on the public lands, recreational user fees, off-highway vehicle use, and a sage grouse conservation plan.<sup>338</sup>

---

COUNTRY NEWS, Sept. 16, 1996, at 4.

330. *See id.*

331. *Id.*

332. *Id.*

333. *See id.*

334. *See Telephone Interview with Karen Slater, supra note 320.*

335. *See id.*

336. *See Telephone Interview with Tina Gromo, Public Affairs Officer, Ariz. BLM Headquarters (Oct. 12, 1997).*

337. *See Telephone Interview with Maria Kammerer, Public Affairs Officer, Cal. BLM Headquarters (Oct. 14, 1997).*

338. *See Southwest Resource Advisory Council Webpage (visited Oct. 27, 1997) <[http://www.co.blm.gov/mdo/mdo\\_sw\\_rac.htm](http://www.co.blm.gov/mdo/mdo_sw_rac.htm)>.* According to the BLM, the Colorado RACs have been operating extremely well, and they recently received Vice-President

There are early indications that regional RACs—with several RACs per state—may be more effective than the statewide RACs, due to the narrower scope of issues and interest groups involved. One BLM employee reported an impression that in the RACs representing entire states, appointments were more prestigious and politically-driven, and RAC members were more inclined to support their own interest group's concerns than work for consensus-based solutions. Similarly, the BLM Public Affairs Officer for California observed that the RACs in her state have very different concerns and constituencies, and she felt it would be difficult to get statewide interest groups to “buy into” regional recommendations.<sup>339</sup> Furthermore, it appears that the regional RACs may be able to spend more time on local issues than statewide RACs. For instance, one of Colorado's three regional RACs has recently spent a significant portion of its time over the course of several meetings considering the advisability of allowing twenty to thirty regular riders to develop a motocross track on public lands outside Gunnison.<sup>340</sup> It seems unlikely that a single RAC responsible for an entire state could spend such a substantial amount of time addressing such a relatively minor, albeit important, local issue.

In a similar vein, public comment may also be facilitated by the regional RACs. Recently, Colorado's Northwest RAC heard public comments from twenty-four individuals at one of its meetings in Steamboat Springs, Colorado.<sup>341</sup> It might be difficult for a statewide RAC to afford time in its meetings for comments from public participants from the entire state. In addition, attending a statewide RAC meeting rather than a regional RAC meeting closer to home requires greater travel time and expense on the part of public participants.

Even if these preliminary observations of the benefits of the regional RACs hold true over the long term, statewide RACs may

---

Gore's National Performance Review Hammer Award for their efforts in developing Colorado's range management standards and guidelines. See Telephone Interview with Sheri Bell, *supra* note 328.

339. See Telephone Interview with Maria Kammerer, *supra* note 337.

340. See Southwest Resource Advisory Council, *Meeting Minutes*, June 12, 1997 (visited Oct. 27, 1997) <<http://www.co.blm.gov/mdo/Jun97.htm>>; Southwest Resource Advisory Council, *Meeting Minutes*, July 10, 1997 (visited October 27, 1997) <<http://www.co.blm.gov/mdo/Jul97min.htm>>.

341. See Northwest Resource Advisory Council, *Meeting Minutes*, May 15, 1997 (visited Oct. 27, 1997) <<http://www.co.blm.gov/gjdo/nwracmin.txt>>.

still be preferable in certain states, particularly those with lower populations or less public interest in range management. Statewide RACs might offset any inherent disadvantage by utilizing local subgroups, such as RRTs, in order to fully address local issues and allow for local collaboration. Each state will need to develop a local participation model that best suits its needs. New Mexico, for instance, has a single statewide RAC, but it has fostered extensive public participation in the development of its draft EIS, with nine counties, including Catron County, the Navajo Nation, and the BLM participating in the process.<sup>342</sup>

As they proceed, the RACs will probably gain considerable power, despite their advisory role.<sup>343</sup> Since at least a majority of

---

342. See Telephone Interview with Remington "Rem" Hawes, Public Affairs Officer, New Mexico BLM Headquarters (Oct. 17, 1997). New Mexico and the BLM are joint lead agencies in the EIS process, and the State invited each of its thirty-two counties to help develop the draft EIS. Nine chose to proceed. By "involving the counties on the front end" of the EIS process, the BLM and the State hope to defuse future conflicts with the counties. *Id.* Additionally, the BLM has worked to improve communications and coordination with the counties through its local offices throughout the State. Hawes indicated this local BLM effort and the counties' participation in the EIS process have been very instrumental in fostering collaborative relationships with the counties. He noted that New Mexico's RAC, which holds meetings throughout the State, has also been effective in showing the possibility of the collaborative efforts between "dyed in the wool" ranchers and environmentalists. Catron County and a few other counties have been extremely interested and involved in the RAC's activities. The RAC developed a set of recommended standards and guidelines that has been incorporated as one alternative in the Draft EIS. See *id.*

343. See Interview with Thomas A. Kourlis, *supra* note 47. Mr. Kourlis, a participant in the Colorado Group and currently the Commissioner of the Colorado Department of Agriculture, indicated that the Colorado Group believed that the BLM's District Managers will be eager to implement the proposals reached through the RAC consensus-building process because: (1) they will save administrative time they would otherwise spend building in-house solutions to range conflicts; (2) they will promote FLPMA's multiple-use mandate by implementing policies developed by multiple user groups; (3) they will be hesitant to risk appearing unreasonable in a RAC appeal to the Secretary of the Interior; and (4) they will save future administrative time spent justifying policies and fighting court battles against upset user groups. Kourlis used a useful model to illustrate the function of the RACs: he drew a triangle with the BLM at the apex and environmentalists and ranchers on each of the bottom corners. He noted that historically the ranchers and environmentalists have approached the BLM individually with their concerns, and the BLM has tried to implement policies it thinks will best appease each group. This process leads to inelegant and poorly optimized solutions, as the BLM is unable to weigh the relative importance of various issues to each group and therefore cannot find compromise very effectively. The purpose of the RACs is to "close the base" of the triangle by providing a forum for ranchers and environmentalists to speak to one

each of the three interest groups in the RACs must approve any recommendation, RAC recommendations must have wide support before they are submitted to the BLM District Manager. The District Managers, who have historically spent a great deal of time trying to appease these different interest groups individually, may now find it more effective to wait for a plan that represents a consensus among representatives of different groups.<sup>344</sup> The process for appeal to the Secretary should also ensure that the RACs' recommendations receive serious consideration. Finally, the range management course and the provisions for the implementation of Technical Review Teams ("TRTs") should ensure that RAC decisions represent technically-astute efforts that are capable of implementation. Given all of these factors, it appears that Ferry Carpenter's "Home Rule on the Range" may yet prove to be a good approach, albeit the modern "rulers" are now *advisors*, and represent a more diverse array of interests in accordance with the multiple-use mandate<sup>345</sup> of FLPMA and modern environmental concerns.

## VI. ANALYSIS OF THE RAC APPROACH

Despite the initial success of the RACs, for many the ultimate test of the RACs will be their ability to help implement changes in the physical condition of the land<sup>346</sup> while maintaining viable ranching communities.<sup>347</sup> As Nevada RAC member Rose Strickland, a veteran Sierra Club spokeswoman, stated, "until we can see results, can see success stories, the jury's still out."<sup>348</sup> However, it may be possible to consider some arguments that have been raised in opposition to local collaborative approaches to federal land management in order to ascertain whether or not the RACs are likely to achieve future success. The following two sections examine the local and collaborative aspects of the RACs in light of organizational theory and the past experience of other

---

another directly. In this respect, the RACs are fundamentally different from the old single-interest Grazing Advisory Boards, which sometimes represented "wildlife interests" (usually from a fish and game perspective) but which did not adequately represent environmental interests. *See id.*

344. *See id.*

345. *See* 43 U.S.C. § 1712(c)(1) (1994).

346. *See* Keister, *supra* note 329.

347. *See* Armstrong, *supra* note 319, at 1-2.

348. Keister, *supra* note 329.

local collaborative groups in order to predict the RACs' effectiveness.

### A. *Local Control*

Despite the Colorado Group's disclaimer that its RAC proposal was simply a "Colorado model" and an "experimental approach,"<sup>349</sup> DOI fully embraced the concept of local advisory boards in its new regulations. As previously noted, DOI has over sixty years of Grazing Advisory Board experience, indicating that local boards may not be the best way to manage the public lands.<sup>350</sup> In fact, George Coggins, Professor of Law at the University of Kansas, has noted that "many if not most of the environmental problems now so prominent on the federal lands stem from prior federal abdication of federal responsibilities and [the] resultant local control."<sup>351</sup> He argues that since the United States owns the federal lands in trust for all of the people,<sup>352</sup> not only westerners, its "abdication" of control over these lands to local groups is an improper surrender of federal responsibility.<sup>353</sup> Furthermore, he claims that "the basic disputes in federal land law can never be finally resolved because the interests of the contestants are too opposed" and that "[s]itting down and feeling good are merely phony substitutes for real conflict resolution."<sup>354</sup>

However, it is difficult to see how conflict resolution can occur by any other process in the West. The federal government owns 48% of the land in the West, and in one state, Nevada, it owns

---

349. 59 Fed. Reg. 14,314, 14,317 (1994).

350. See *supra* notes 143-153 and accompanying text.

351. George C. Coggins, *Abdication Can Be Fun, Join the Orgy Everyone: A Simpleton's Perspective on Abdication of Federal Land Management Responsibilities* 4, in CHALLENGING FEDERAL OWNERSHIP AND MANAGEMENT: PUBLIC LANDS AND PUBLIC BENEFITS (University of Colorado School of Law, Natural Resources Law Center, Conference Proceedings, Oct. 11-13 1995).

352. See *Light v. United States*, 220 U.S. 523 (1911).

353. See Coggins, *supra* note 351, at 2-3.

354. *Id.* at 14.

82%.<sup>355</sup> Hence, "issues that anywhere else in the nation would be state or local . . . are federal issues in the West."<sup>356</sup> These include local issues like whether or not a rancher can build a stock tank, how many cattle he or she may put to pasture, or how many native plant species should be present in the pasture with the cattle. Even assuming that the federal government could reach a political consensus on how to properly manage each of its 177 million acres of BLM land in the West—which seems highly unlikely—history suggests that "no land can be controlled from afar, against the will of the people."<sup>357</sup> Nor does it seem particularly equitable to attempt to do so; such control would not *resolve* conflicts, it would merely quash them with homogenized federal power.

Nonetheless, Professor Coggins raises the indisputable point that the local control of the Grazing Advisory Boards was inadequate to protect the public trust in BLM lands in the West. The present condition of the western ranges is testament to this fact.<sup>358</sup> So, regardless of any equitable argument for local control,

---

355. See Bureau of Land Management, Department of Interior, PUBLIC LAND STATISTICS 1996, at 6 (1997). The following is the breakdown of federal ownership by state:

	Acres Owned by Federal Government	Total Acres In State	Federal Ownership
Arizona	32,488,418	72,688,000	45%
California	46,956,438	100,206,720	47%
Colorado	24,140,220	66,485,760	36%
Idaho	32,946,171	52,933,120	62%
Montana	25,959,402	93,271,040	28%
Nevada	58,264,529	70,264,320	83%
New Mexico	26,549,505	77,766,400	34%
Oregon	36,939,182	61,598,720	60%
Utah	33,838,182	52,696,960	64%
Washington	11,456,308	42,693,760	27%
Wyoming	31,024,074	62,343,040	50%
Total	360,562,429	752,947,840	48%*

\* Average

356. Robert H. Nelson & Mary M. Chapman, *Voices from the Heartland: New Tools for Decentralizing Management of the West's Public Lands 1* (Sept. 1995) (unpublished manuscript, draft, on file with author).

357. *Id.* at 2 (quoting Ed Marston, publisher of the HIGH COUNTRY NEWS).

358. See *supra* notes 56-68 and accompanying text.

how will the RACs avoid repeating history? Several potential answers are apparent. First, the RACs consist of multiple-interest groups which have been chosen and are considered appropriate by DOI for the RACs' diverse objectives. DOI also approves RAC membership nominations, so it has control not only over the types of interest groups in the RACs, but also the precise identity of members. Thus, unlike the Grazing Advisory Boards, RACs should not become dominated by any one interest group, making purely self-serving advice to the BLM unlikely. Second, the RACs and the BLM are now constrained by ecosystem management standards and guidelines, which in turn are constrained by national fundamentals of rangeland health.<sup>359</sup> All permits issued must now conform to these guidelines. While not a panacea, these standards and guidelines provide a new tool to measure and mitigate the impact of grazing on the environment while ensuring that local management practices conform to national priorities. Finally, the RACs are subject to public participation and scrutiny in an era when protection of the environment is not only a national but also a local concern.<sup>360</sup> Unlike the early Grazing Advisory Boards, in most regions the RACs will be unable to flaunt national environmental concerns because local environmental groups will monitor and publicize the RACs' transgressions for local and national attention.

However, the preceding arguments merely indicate that the RACs should not be detrimental to the West's public lands. There are stronger arguments that RACs will be of benefit. Here I borrow liberally from the thoughts of Mary M. Chapman, a Senior Research Fellow at the Center for the New West.<sup>361</sup> Chapman notes that local collaborative groups are able to frame problems in a context that is "real, tangible and decipherable" rather than abstract, making it easier to "define goals and objectives and

---

359. See *supra* note 296 and accompanying text.

360. See *supra* notes 120-24 and accompanying text.

361. See Mary M. Chapman, *Consensus Groups and Grassroots Democracy: Maybe Those Who Say it Can't Be Done Should Get Out of the Way of Those Doing It* 5, in CHALLENGING FEDERAL OWNERSHIP AND MANAGEMENT: PUBLIC LANDS AND PUBLIC BENEFITS (University of Colorado School of Law, Natural Resources Law Center, Conference Proceedings, Oct. 11-13 1995). Chapman received her doctorate in public administration from the University of Colorado and has since served on numerous local and regional advisory boards. See Nelson & Chapman, *supra* note 356, at 3.

measure progress.”<sup>362</sup> Because “participants are expected to explain their own interests in relationship to the broader interests of the ‘place’ they live,” the need for compromise is more obvious, and thus more “palatable.”<sup>363</sup> “Nobody expects to get everything they want. Everybody hopes to get more than they would had they not participated.”<sup>364</sup> The broader pool of knowledge created by the diverse viewpoints on the collaborative groups like the RACs also allows for the development of more durable, long-lasting solutions.<sup>365</sup>

Chapman cites Daniel Kemmis’ argument that “the political culture of a place is not something apart from the place itself . . . [and as such] the strengthening of political culture . . . must take place and must be studied in the context of very specific places and of the people who struggle to live well in such places.”<sup>366</sup> Based on this concept of “place,” Chapman observes that groups like the RACs will be able to “start thinking in terms of ‘connectedness’ [to their land or “place”], the integrity of the landscape, [and] its relationship to the economy and to the people.”<sup>367</sup> The RACs’ ability to do this will be enhanced by their members’ training in range ecosystems and by the diverse perspectives of the RACs’ community representatives.

This process of building community and ecosystem knowledge can also be enhanced by science. Historically, there have been weaknesses associated with the application of scientific management methods through a political environment.<sup>368</sup> By divorcing science from the regulatory process and using it instead to address specific local questions, science “can once again be a ‘friend’ in the decision-making process.”<sup>369</sup> This prospect is made more tangible for the RACs by their ability to call on TRTs to address specific scientific questions on the range.

Finally, because local groups operate within a locally-defined “place” and on issues of limited scope, “responsibility and accountability for decisions and implementation can be clearly

---

362. *Id.* at 5.

363. *Id.*

364. *Id.*

365. *See id.*

366. DANIEL KEMMIS, *COMMUNITY AND THE POLITICS OF PLACE* 7 (1990).

367. Chapman, *supra* note 361, at 6.

368. *See id.* at 3.

369. *Id.* at 6.

identified and reflected in workplans."<sup>370</sup> As advisory bodies, RACs may have less control over implementation of their recommendations than other types of community working groups; however, there is no reason why they cannot be *specific* in their recommendations regarding implementation. The BLM, as the responsible implementing agency, will then be accountable to the RACs and to the public to respond to specific proposals. If it egregiously fails to do so, the RACs may appeal the issue to the Secretary.

### B. Collaboration and Consensus

The Department of the Interior is also optimistic about the RACs' collaborative and consensus-based approach.<sup>371</sup> When it decided not to implement the Colorado Model RAC on an experimental basis, DOI explained:

The Department understands that it may in some cases be difficult to achieve consensus, and that the development of consensus may be a time-consuming process. However, consensus decisionmaking is at the heart of the grazing management program. The Department is committed to the concept that all groups should work together to develop recommendations regarding the management of the public rangelands. Decisions reached in this way will be owned by all parties involved, and there will be significantly less likelihood of appeals and disputes, and greater likelihood that effective actions will be identified and implemented. In the long run, the Department believes that consensus-based decisionmaking will actually shorten the time required to reach a decision and implement it on the ground.<sup>372</sup>

---

370. *Id.* at 5.

371. To an extent, the terms "collaboration" and "consensus-based" are inherent in one another. Collaboration occurs:

When each of the parties in conflict desires to *satisfy fully the concerns of all parties* . . . . In collaboration, the behavior of the parties is aimed at solving the problem and at clarifying the differences rather than accommodating various points of view. The participants consider the full range of alternatives; the similarities and differences in viewpoint become more clearly focused; and the causes or differences become outwardly evident. Because the solution sought is advantageous to all parties, collaboration is often thought of as a win-win approach to resolving conflicts.

STEPHEN P. ROBBINS, *ESSENTIALS OF ORGANIZATIONAL BEHAVIOR* 174 (4th ed. 1994) (emphasis added).

372: 60 Fed. Reg. 9916 (1995).

Theory and past experience tend to support DOI's optimism. Research has indicated that the most enduring grazing systems around the world are founded not on centralized management and nationally-policed structures, but on lands governed by collaborative rulemaking and dispute resolution.<sup>373</sup>

Several factors often determine failure or success of such governing systems. First, the parties must desire a solution to the problem or issue.<sup>374</sup> In this regard, there can be a "feeling that something must change; that the status quo is no longer acceptable."<sup>375</sup> Ranchers and environmentalists, as well as other public land users, have heavy stakes in the land, and it appears that they may finally be realizing the necessity for collaboration. Successful environmental litigation, a changing economic and political landscape, and political rumblings of ending artificially low federal grazing fees have forced ranchers to renounce dependence on the ranching "lords of yesterday."<sup>376</sup> For their part, environmentalists appear prepared to accept that as between ranchers and developers, "ranchers are better stewards of the land,"<sup>377</sup> and that in much of the New West, the alternative to ranching on the private lands adjacent to BLM lands is developing it.<sup>378</sup> However, the RACs still face the risk in some regions of the West that there will be insufficient incentive for change. One Utah environmentalist observed in the context of wilderness designations that: "Our time is better spent filing appeals rather than sitting around the table trying to talk to a bunch of people who aren't interested in listening . . ."<sup>379</sup> To the extent that the parties to grazing issues share similar sentiments, the RACs could be unsuccessful, or at least fail to evoke cooperation from their non-RAC colleagues.<sup>380</sup>

---

373. See Riebsame, *supra* note 16, at 28.

374. See Jim Martin, *Martin's Rules of Collaborative Decision Making*, Address to the Natural Resources Law Center, University of Colorado (July 1996) (lecture notes on file with author). Martin is an attorney at the Environmental Defense Fund, Boulder, Colo.

375. Lisa Jones, *Some Not-So-Easy Steps to Successful Collaboration*, HIGH COUNTRY NEWS, May 13, 1996, at 8.

376. WILKINSON, *supra* note 14.

377. Nelson & Chapman, *supra* note 356, at 3 (quoting Gary Sprung, leader of an environmental group in Crested Butte, Colo.).

378. See *id.*

379. Jones, *supra* note 375.

380. Environmentalists, in particular, appear to have some valid concerns about local collaboration. In November 1995, Michael McCloskey, the Chairman of

Second, collaborative efforts are often facilitated if a neutral third party pushes the disputing parties toward resolution.<sup>381</sup> The DOI rules triggered this process by forcing each state to develop state-level range standards and guidelines within eighteen months or accept national fallback standards.<sup>382</sup> Now that most states' standards and guidelines have been approved by the Secretary, the RACs will be coaxed, if not forced, to find consensus-based solutions that will achieve the standards and guidelines.

Third, the collaborative group must be carefully selected. The group must be balanced—one side cannot vastly outnumber the other<sup>383</sup>—and it must contain members representing the full range of interests, yet be small enough to allow everyone to participate constructively in order to eventually come to a

---

the Sierra Club, wrote a letter to the Sierra Club's Board of Directors questioning the wisdom of community level collaboration from the perspective of a national environmental group. See Michael McCloskey, Report of the Chairman of the Sierra Club to the Board of Directors, Nov. 8, 1995 (on file with author) (reprinted as Michael McCloskey, *The Skeptic: Collaboration Has Its Limits*, HIGH COUNTRY NEWS, May 13, 1996, at 7). McCloskey expressed concern that industry is better able to dominate community groups than national forums, that stakeholder collaboration rarely provides for effective representation by distant stakeholders such as national environmental groups, that in fact such groups usually operate in communities where the Sierra Club is "least organized and potent," and maximize the influence of "those who are least attracted to the environmental cause and most alienated from it." *Id.* He proceeds to note that it is difficult to achieve parity of experience, training, skills, or resources between local environmentalists and industry professionals, making negotiations uncompetitive. Furthermore, such negotiations, he argues, take large amounts of time away from regular environmental activism, and tend to "de-legitimate conflict as a way of dealing with issues and mobilizing support." *Id.* Finally, he notes that consensus approaches to decision-making favor the status quo, and that where the status quo is unacceptable, a single hold-out can stall necessary changes. The reader may note several means by which the RACs address some of these concerns, such as a state and federal appointment process rather than a purely local process, publically funded TRTs, provisions for representation by national environmentalists, and careful screening of RAC nominees to ensure that they are committed to the interests they are to represent. See *supra* Part IV.B. However, for the present purposes, it is enough to note that many environmentalists are still skeptical of local collaboration as a tool to protect public lands, and it is likely that only future success on the ground will "sell" the RAC concept to these people. Because RAC members must show a commitment to collaboration in order to be appointed, skepticism by environmentalists should not directly affect the RAC's operation, but it may make them less effective insofar as they are unable to replace litigation on a given issue with a consensus-based solutions.

381. See *id.*

382. See 43 C.F.R. § 4180.2(f) (1996).

383. See Martin, *supra* note 374.

collaborative decision.<sup>384</sup> In the case of the RACs, the balance is achieved in thirds,<sup>385</sup> and members are carefully selected to represent appropriate interest groups for each state's range issues.<sup>386</sup> The selection process should also ensure that members have an interest in the outcome, rather than simply having strong views on the appropriate outcome.<sup>387</sup> The personal stake of RAC members in the outcome of their recommendations is ensured under DOI's regulations: RAC members must be residents of the RAC's state, possess knowledge of the public lands, and be members of interest groups that are either users of the public lands or concerned about the land's ecological, scientific, archeological, or historical value.<sup>388</sup>

Fourth, members must be willing at the outset to agree that either every person "buys in" at the end of the process or there is no resolution of the issue—majorities do not rule.<sup>389</sup> Without this requirement, there is little incentive to accommodate the diverse interests of the group into the collaborative decision. In the A and B RACs, all decisions must be approved by either a 60% or 80% vote of the members as well as a 60% or 50% approval within each of the three special interest categories represented.<sup>390</sup> By contrast, the C RACs may approve recommendations with approval from only a simple majority of the RAC and each of its interest groups. Given these requirements, particularly that of interest group majority approval, the A and B RACs will need an agreement that is close to a true consensus to make recommendations. C RACs will need at least consensus among the majority members of each interest group. The allowance for an imperfect consensus, which mitigates the impact of a single hold-out member, will enable decisions to be made at an efficient pace, but it will also reduce the motivation of the group to find a solution that is amenable to all. Some RACs have recognized the latter problem and indicate that despite the regulations they "strive[]

---

384. *See id.*

385. *See* 43 C.F.R. § 1784.6-1(a)(1) (1996).

386. *See supra* notes 324-28 and accompanying text.

387. *See Jones, supra* note 375.

388. *See* 43 C.F.R. § 1784.6-1(c) (1996) (residency); § 1784.6-1(a)(1) (representation).

389. *See Martin, supra* note 374.

390. *See* 43 C.F.R. § 1784.6-2(a)(1)(iii) (A RACs); §§ 1784(a)(2)(iii) & 1784.6-1(h) (B RACs).

for consensus before making official recommendations to the BLM.<sup>391</sup>

Fifth, it helps if the relationship between the collaborators is long-term rather than short-term. Longer-term relationships often lead to increased trust between the parties as well as to a better understanding among the parties of each other's position.<sup>392</sup> Long-term relationships also lead negotiators to consider the impact of their present decisions to cooperate on their future ability to garner cooperation from their co-collaborators.<sup>393</sup> The terms of RAC members are generally two years, unless otherwise specified in the RAC's charter.<sup>394</sup> Many RAC charters provide for three-year rotating terms, with one third of the membership to the RAC appointed each year.<sup>395</sup> The two and three-year terms should afford RAC members with time to develop trust and understanding of one another, as well as a sufficiently long-term relationship to foster consensus.

Sixth, it helps if the resource "pie" to be divided by collaborators is not fixed in size, but rather variable depending on the allocation scheme chosen by the collaborators.<sup>396</sup> Where the quantity of the resource is fixed, the parties must rely on competition or, at best, compromise in order to allocate its uses.<sup>397</sup> There is evidence that effective range management techniques can simultaneously promote ranching profitability and environmental values such as biodiversity and biomass.<sup>398</sup> Hence, at least in some cases, RACs should be able to formulate range management alternatives that satisfy both ranching and environmental concerns.

---

391. Southwest Resource Advisory Council Webpage (last modified Sept. 17, 1997) <[http://www.co.blm.gov/mdo/mdo\\_sw\\_rac.htm](http://www.co.blm.gov/mdo/mdo_sw_rac.htm)>, at 1; Northwest Resource Advisory Council Webpage <<http://www.co.blm.gov/gjdo/nwrac.html>>, at 1.

392. See ROBBINS, *supra* note 371, at 179.

393. See *id.* at 178-79. Longer-term relationships may also help collaborators to avert the problem of the "tragedy of the commons," Hardin, *supra* note 128, at 1244, by affording users of the commons the opportunity to learn over time that cooperation is more desirable than destroying the commons. This is a classic example of "win-win" collaboration. See ROBBINS, *supra* note 371, at 178.

394. 43 C.F.R. § 1784.3(a) (1996).

395. See BUREAU OF LAND MANAGEMENT & STATE OF COLORADO, RESOURCE ADVISORY COUNCIL CHARTER 3 (1996); BUREAU OF LAND MANAGEMENT & STATE OF UTAH, RESOURCE ADVISORY COUNCIL CHARTER 3 (1997); Telephone Interview with Maria Kammerer, *supra* note 337.

396. See ROBBINS, *supra* note 371, at 178.

397. See *id.*

398. See *supra* note 69 and accompanying text.

All of this analysis assumes that no “fundamentally opposing value choices” need be made.<sup>399</sup> Herein lies the greatest potential stumbling block for local collaboration: if the ranchers and environmentalists cannot frame their values in terms which overlap to some extent, there will be no room for consensus. However, ranchers and environmentalists do have some strong common interests, including the stewardship of healthy range ecosystems and the preservation of viable ranching communities.<sup>400</sup> Additionally, as residents of a common state, they share an interest in advising the management of the lands that surround their homes and ranches rather than allowing management from afar by politicians and bureaucrats in Washington, D.C.<sup>401</sup>

## VII. CONCLUSION

The people of the West have an opportunity in the Resource Advisory Councils to demonstrate that they can be wise stewards of the public lands—that people living closest to the land are not necessarily the ones most likely to exploit it for their own gain, but rather are the ones most likely to understand and care for it. If westerners are successful in this endeavor, they will achieve an equitable level of input into decisions which impact their livelihood, communities, and surrounding ecosystems. More importantly, they will show that the most effective way to manage the public lands for multiple use and sustained yield is to allow those with the greatest interest and expertise in both to impact land management decisions.

The Colorado model of local, multiple-interest, collaborative range advisory councils, as implemented in the DOI's new regulations, offers states throughout the West a foundation for their own community-based involvement in range reform. At the same time, the new regulations ensure—by imposing nationwide

---

399. Martin, *supra* note 374; see also George C. Coggins, *supra* note 351, at 5. “The notion that fundamentally opposing value choices can be reconciled to the satisfaction of all concerned through informal conciliatory mechanisms is a fantasy, and probably a dangerous fantasy.” *Id.*

400. See, e.g., *supra* notes 200-02 and accompanying text. While some environmentalists, such as George Wuerthner, would claim that these goals are mutually exclusive, many people believe that they are not incompatible, and are in fact complementary. See, e.g., Brown, *supra* note 69, at 23-24.

401. See *supra* note 124 and accompanying text.

fundamentals of rangeland health and by requiring state-level ecological standards and guidelines—that the public trust in the federal lands will not be violated. If successful, and it appears they may be, the RACs may find solutions to local problems that were nowhere to be found in the halls of Congress or the Department of the Interior in Washington, D.C. They may stop the endless litigation over alleged environmental abuses and unfair BLM land management decisions. And they may, at last, foster peace and respect among the ranchers and environmentalists in Catron County, New Mexico. In the end, it is only a shared passion for the public lands which divides them.