# United States Department of the Interior

OFFICE OF THE SOLICITOR

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MEMORANDUM

To: Assistant Secretary - Policy, Management and Budget
Assistant Secretary - Land and Minerals Management
Director, Bureau of Land Management

From: Solicitor

Subject: Clarification of M-37008

**Background**

On October 4, 2002, I issued Solicitor Opinion M-37008 (M-Opinion) concerning the authority for the Bureau of Land Management (BLM) to consider requests for retiring grazing permits and leases on public lands. This memorandum clarifies when BLM must determine if grazing lands are "chiefly valuable for grazing."

This memorandum concludes that chiefly-valuable-for-grazing determinations must be made for administrative purposes whenever the Secretary intends to establish a grazing district, add to a grazing district or modify a district's boundary. Whenever the Secretary considers retiring grazing permits within a grazing district, she must determine whether the permitted lands remain chiefly valuable for grazing if any such retirement may ultimately result in the modification of the district's boundaries. This determination must be adopted in a land use plan or through an amendment to the existing plan. Administrative factors the Secretary should consider in making this determination are: (1) the disruptive effect to any remaining grazing allotments within the district; (2) the decision's effect on the distribution of future grazing revenues within the district; and (3) whether rangeland health can be improved without constructing or maintaining physical range improvements. A chiefly-valuable-for-grazing determination is required only when the Secretary is considering creating or changing grazing districts boundaries. Such a determination is not required nor appropriate when establishing grazing levels within a district.

**History of "Chiefly Valuable for Grazing"**

The concept of "chiefly valuable for grazing" first appeared in the Stockraising Homestead Act of 1916 (SHA).[1] According to the United States Geological Survey (USGS), the first designation of stock-raising lands (lands chiefly valuable for grazing) under the SHA,

[1]Sec. 2, 39 Stat. 862 (1916).

occurred on November 28, 1917.[2] Prior to this first designation, the Department of the Interior issued instructions to the USGS on how to classify lands under the SHA.[3] Basically, if the land was capable of supporting diversified farming, dry-farming, or was irrigable, the land was not available for disposal as land chiefly for grazing under the SHA.[4] If the land contained merchantable timber, the land was also excluded from designation as chiefly valuable for grazing under the SHA.[5]

The USGS developed a system to classify the public lands by determining the lease value of the land and assessing whether the land was capable of supporting farming. The USGS sorted the lease value of the land into categories of less than one cent per acre, one to two cents per acre, and two to three cents per acre.[6] The one-cent land had a carrying capacity of less than eight animal units to the square mile, the one to two cent land ranged from eight to 15 animal units to the square mile and the remainder able to carry more than 15 or more animal units to the square mile.[7] These designations made up the lands characterized as chiefly valuable for grazing and served as the foundation for the formation of grazing districts.

**The Taylor Grazing Act**

In 1934, Congress enacted the Taylor Grazing Act[8] (TGA) to prevent overgrazing, to stabilize the livestock industry and to provide for the orderly use of the range.[9] To advance these goals of the TGA, President Roosevelt issued two Executive Orders withdrawing public lands from the operation of the public land laws for the purpose of classifying the land as chiefly

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[2]1918 U.S.G.S. Ann. Rep. 127.

[3]46 I.D. 252 (1917).

[4]Id. at 253.

[5]Id. at 254-55. "The presence of a small amount of timber on the land classified will not exclude it from designation, and a 40-acre tract which contains less than 25,000 feet of saw-timber or its equivalent in poles, posts, or cordwood may, therefore, be designated."

[6]To Provide for the Orderly Use, Improvement, and Development of the Public Range, Hearings on H.R. 6462 Before the Senate Comm. on Public Lands, 73rd Cong., 2d Sess. 49-51 (April 20 to May 2, 1934).

[7]Id.

[8]43 U.S.C. §§ 315-315r (2000).

[9]48 Stat. 1269 (1934) (language derived from uncodified preamble); *see also* 43 U.S.C. § 315a and Executive Order No. 6910 (November 26, 1934), *reprinted in* 54 I.D. 539 (1934). A later order excluded grazing districts from E.O. 6910. Executive Order No. 7274 (January 14, 1936) *reprinted in* 55 I.D. 444 (1936). *See also Andrus v. Utah*, 446 U.S. 500, 516 n. 20 (1980).

valuable for grazing.[10] As envisioned by the TGA, only unreserved public domain lands (exclusive of Alaska) that, in the opinion of the Secretary, "are chiefly valuable for grazing and raising forage crops" may be included within a grazing district.[11] The TGA authorizes the Secretary of the Interior, in his or her discretion, to create grazing districts, to add to the districts and to modify district boundaries.[12] Under this authorization, grazing districts were established and still exist today. Moreover, Congress set apart the chiefly-valuable-for-grazing classification from other classifications by requiring the Secretary to adequately safeguard grazing privileges.[13]

The TGA provides that the Secretary "shall make provision for the protection, administration, regulation and improvement of such grazing districts."[14] Grazing districts, as contemplated by the TGA, provide for the orderly use of the range, effectuate the Secretary's duty to safeguard grazing privileges and determine the formula for the distribution of grazing fees. For example, under the TGA and the Federal Land Policy and Management Act (FLMPA)[15] half of the fees obtained from both grazing permits (issued for grazing within a grazing district) and grazing leases (issued for grazing outside of a grazing district) is deposited in a separate U.S. Treasury account for the purpose of rehabilitation, protection and range improvements on the grazing lands.[16] The other 50% of the fees are treated differently depending upon whether the fees are generated from a grazing district permit or a non-grazing district lease. The 50% of the fees from a grazing district are split with 37.5% sent to the U.S. Treasury as miscellaneous receipts and 12.5% returned to the state or county where the district is located for

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[10]Exec. Order No. 6910 (November 26, 1934) *reprinted in* 54 I.D. 539 (1934). Exec. Order No. 6910 temporarily withdrew all "vacant, unreserved, and unappropriated lands" in Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Utah, and Wyoming from settlement, location, sale, or entry for the express purpose of classification and pending determination of the most useful purpose for which the land may be used under the provisions of the TGA. President Roosevelt issued a similar Executive Order, No. 6964, on February 5, 1934, *reprinted in* 55 I.D. 188 (1935), withdrawing "all public lands" in Alabama, Arkansas, Florida, Kansas, Louisiana, Michigan, Minnesota, Mississippi, Nebraska, Oklahoma, Washington, and Wisconsin for determining the most useful purpose under certain projects known as "The Land Program, Federal Emergency Relief Administration," and for conservation and development of natural resources.

[11]43 U.S.C. § 315.

[12]43 U.S.C. § 315.

[13]43 U.S.C. § 315b ("So far as consistent with the purposes and provisions of this subchapter, grazing privileges recognized and acknowledged shall be adequately safeguarded.").

[14]43 U.S.C. § 315a.

[15]43 U.S.C. §§ 1701-1785 (2000).

[16]43 U.S.C. § 315i (TGA) and 43 U.S.C. § 1751(b)(FLPMA). "Such rehabilitation, protection, and improvements shall include all forms of range land betterment including but not limited to, seeding and reseeding, fence construction, weed control, water development, and fish and wildlife enhancement...." 43 U.S.C. § 1751(b)(FLPMA). *See also* 43 C.F.R. § 4120.3-8 (Range Improvement Fund).

expenditure as the State Legislature may prescribe. [17] The TGA and FLPMA both recognize the importance of improving the range by constructing range improvements that lead to "substantial betterment of forage conditions with resulting benefits to wildlife, watershed protection, and livestock production."[18] A portion of the grazing receipts are used for these purposes. These administrative functions remain a vital component of meeting the objectives of the TGA. Thus, the grazing districts initiated by the TGA retain their importance today as contemplated by Congress when it passed the TGA.

**The Federal Land Policy and Management Act and Grazing**

When enacting FLPMA, Congress did not repeal or modify the grazing provisions of the TGA.[19] Instead, FLPMA set forth a new structure for the Secretary and the BLM to manage federal lands. Congress also expressly protected the grazing permit system as contemplated by the TGA[20] and expressly preserved the classifications and withdrawals that led to the creation of grazing districts.[21]

FLPMA requires the Secretary to "develop, maintain, and, when appropriate, revise land use plans" for all federal land uses.[22] Land use planning decisions, including allotment management plans (AMPs), control livestock grazing on federal land.[23] These land use plans determine grazing levels and periods of use in order to meet the objectives of multiple use and

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[17] 43 U.S.C. § 315i. For grazing lease receipts, the remaining 50% return to the state and county of the grazing lease.

[18] 43 U.S.C. § 1751(b)(1). *See also* 43 U.S.C. § 315a (improvement of the range); Public Range Improvement Act, 43 U.S.C. § 1901(f) ("the term 'range improvement' means any activity or program on or relating to rangelands which is designed to improve production of forage; change vegetative composition; control patterns of use; provide water; stabilize soil and water conditions; and provide habitat for livestock and wildlife. The term includes but is not limited to, structures, treatment projects, and use of mechanical means to accomplish the desired results.").

[19] 43 U.S.C. § 1701(b) (FLPMA "shall be construed as supplemental to and not in derogation of the purposes for which public lands are administered under other provisions of law.").

[20] § 701(a), Pub. L. 94-579 (1976) ("Nothing in this Act, or in any amendment made by this Act, shall be construed as terminating any valid lease, permit, patent, right-of-way, or other land use right or authorization existing on the date of approval of this Act [Oct. 21, 1976].").

[21] § 701(c), Pub. L. 94-579 (1976) ("All withdrawals, reservations, classifications, and designations in effect as of the date of approval of this Act [Oct. 21, 1976] shall remain in full force and effect until modified under the provisions of this Act or other applicable law.").

[22] 43 U.S.C. § 1712(a).

[23] 43 U.S.C. § 1702(k) ("An 'allotment management plan' means a document prepared in consultation with the lessees or permittees involved, which applies to livestock operations on the public lands or on lands within National Forests in the eleven contiguous Western States....").

sustained yield as well as economic and other objectives as determined by the Secretary.[24] The land use planning process, as opposed to the classification process, establishes grazing use. Therefore, determining whether federal land remains chiefly valuable for grazing is neither required nor appropriate during the land use planning process when establishing grazing levels, as in an allotment management plan. An exception to this principle exists when and if the Secretary chooses to create a new grazing district, add to a district or modify a district's boundary as envisioned by the TGA.[25]

The M-Opinion recognizes that the Secretary has the discretion to adjust grazing use based on range conditions, including cancelling a permit, and to regulate the occupancy and use of the range. The BLM determines actual levels and periods of use through the land use planning process. If the BLM develops an AMP for the grazing lands, FLPMA requires the BLM to do so "in careful and considered consultation, cooperation and coordination with the lessees, permittees, and landowners involved."[26] The Secretary has discretion under FLPMA to use the land use planning process to cancel a permit, change grazing use distributions, or to devote the land to another public purpose or disposal, but such a decision must be in accordance with the relevant land use plan.[27]

**Grazing "Retirement"**

Even though the Secretary has discretion to discontinue grazing, complete and permanent elimination of grazing or a grazing district must be carefully considered and should avoid contravening the purposes for which Congress enacted the TGA. Eliminating grazing or a grazing district may

- disrupt the orderly use of the range,
- breach the Secretary's duty to adequately safeguard grazing privileges,
- be contrary to the protection, administration, regulation and improvement of public lands within grazing districts,
- hamper the government's responsibility to account for grazing receipts, or
- impede range improvements as foreseen by the TGA and FLPMA.[28]

In deciding when the BLM must determine whether federal lands remain chiefly valuable

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[24] 43 U.S.C. § 1702(k)(1).

[25] 43 U.S.C. § 315.

[26] 43 U.S.C. § 1752(d).

[27] 43 U.S.C. § 1752(g). *See also* 43 U.S.C. § 1712(e)(2) (discontinuing a major federal land use may compel Congressional reporting requirements).

[28] 43 U.S.C. § 315i and 43 U.S.C. § 1751(b).

for grazing, we look to the TGA itself. Under section 1 of the TGA, the Secretary must determine whether federal lands are chiefly valuable for grazing when she establishes a grazing district, adds to a district or modifies a district's boundaries.[29] Land restoration achieved by temporary non-grazing may be authorized through land use planning and does not require reconsidering a chiefly-valuable-for-grazing determination.[30] The Secretary may also make a chiefly-valuable-for-grazing determination under section 7 of the TGA. Section 7 of the TGA authorizes the Secretary to classify lands for any uses other than grazing and raising forage crops (as would occur if the Secretary permanently retired public lands from grazing), for disposal in satisfaction of an entry, exchange, or selection or location under any of the remaining non-discretionary land laws (excluding Mining Laws).[31] However, since the passage of FLPMA and its land use planning requirements, section 7 classifications rarely occur in today's federal land management.

Classification of lands as chiefly valuable for grazing is no longer necessary for land use planning because the Secretary has already made the original classification required by TGA. Therefore, there is no need for the BLM continually to re-determine whether the lands remain chiefly valuable for grazing during the land use planning process when establishing grazing levels or when renewing a grazing permit. Thus, a permittee may relinquish a permit but, barring a better use as determined by the Secretary through land use planning, the forage attached to the permit remains available for other permittees until the TGA classification is terminated or the land is removed from the grazing district. As long as the boundary of the grazing district remains in place and the classification and withdrawals remain in effect, there is a presumption that grazing within a grazing district should continue. This was the holding in *PLC v. Babbitt*, 167 F.3d 1287, 1308 (10th Cir. 1999), *aff'd on other grounds*, 529 U.S. 728 (2000) ("Congress intended that once the Secretary established a grazing district under the Taylor Grazing Act (TGA), the primary use of that land should be grazing.").[32] Finally, as stated in the M-Opinion, any decision to retire livestock grazing on federal lands is not permanent, absent some congressional action. Any such action is subject to reconsideration and reversal during subsequent land use planning.[33]

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[29]43 U.S.C. § 315 ( "[T]he Secretary is authorized, in his discretion, by order to establish grazing districts or additions thereto and/or modify the boundaries thereof...").

[30]This memorandum does not address other activities that FLPMA may authorize within grazing districts.

[31]43 U.S.C. § 315f. In these situations, the BLM looks *prospectively* at the intended land use without examining the existing classification.

[32]*See also* NRDC v. Hodel, 624 F.Supp. 1045, 1054 (D. Nev. 1985). "[The mandate of Congress in PRIA was that livestock use was to continue as an important use of public lands; they should be managed to maximize productivity for livestock and other specified uses."

[33]*See* 43 U.S.C. § 1712(e)(1) ("Such decisions, including but not limited to exclusions (that is, total elimination) of one or more of the principal or major uses made by a management decision shall remain subject to reconsideration, modification, and termination through revision by the Secretary or his delegate, under the provisions of this section, of the land use plan involved.").