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# United States Department of the Interior

OFFICE OF THE SOLICITOR

MAY 13 2003

## MEMORANDUM

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

From: Solicitor *WOM*

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).<sup>1</sup> According to the United States Geological Survey (USGS), the first designation of stock-raising lands (lands chiefly valuable for grazing) under the SHA,

<sup>1</sup>Sec. 2, 39 Stat. 862 (1916).

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occurred on November 28, 1917.<sup>2</sup> Prior to this first designation, the Department of the Interior issued instructions to the USGS on how to classify lands under the SHA.<sup>3</sup> 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.<sup>4</sup> If the land contained merchantable timber, the land was also excluded from designation as chiefly valuable for grazing under the SHA.<sup>5</sup>

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.<sup>6</sup> 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.<sup>7</sup> 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<sup>8</sup> (TGA) to prevent overgrazing, to stabilize the livestock industry and to provide for the orderly use of the range.<sup>9</sup> 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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<sup>2</sup>1918 U.S.G.S. Ann. Rep. 127.

<sup>3</sup>46 I.D. 252 (1917).

<sup>4</sup>Id. at 253.

<sup>5</sup>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."

<sup>6</sup>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, 73<sup>rd</sup> Cong., 2d Sess. 49-51 (April 20 to May 2, 1934).

<sup>7</sup>Id.

<sup>8</sup>43 U.S.C. §§ 315-315r (2000).

<sup>9</sup>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.<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup> 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.<sup>13</sup>

The TGA provides that the Secretary “shall make provision for the protection, administration, regulation and improvement of such grazing districts.”<sup>14</sup> 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)<sup>15</sup> 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.<sup>16</sup> 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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<sup>10</sup>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.

<sup>11</sup>43 U.S.C. § 315.

<sup>12</sup>43 U.S.C. § 315.

<sup>13</sup>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.”).

<sup>14</sup>43 U.S.C. § 315a.

<sup>15</sup>43 U.S.C. §§ 1701-1785 (2000).

<sup>16</sup>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.<sup>17</sup> 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.”<sup>18</sup> 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.<sup>19</sup> 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<sup>20</sup> and expressly preserved the classifications and withdrawals that led to the creation of grazing districts.<sup>21</sup>

FLPMA requires the Secretary to “develop, maintain, and, when appropriate, revise land use plans” for all federal land uses.<sup>22</sup> Land use planning decisions, including allotment management plans (AMPs), control livestock grazing on federal land.<sup>23</sup> 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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<sup>17</sup>43 U.S.C. § 315i. For grazing lease receipts, the remaining 50% return to the state and county of the grazing lease.

<sup>18</sup>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.”).

<sup>19</sup>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.”).

<sup>20</sup>§ 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].”).

<sup>21</sup>§ 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.”).

<sup>22</sup>43 U.S.C. § 1712(a).

<sup>23</sup>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.<sup>24</sup> 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.<sup>25</sup>

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."<sup>26</sup> 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.<sup>27</sup>

### **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.<sup>28</sup>

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

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<sup>24</sup>43 U.S.C. § 1702(k)(1).

<sup>25</sup>43 U.S.C. § 315.

<sup>26</sup>43 U.S.C. § 1752(d).

<sup>27</sup>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).

<sup>28</sup>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.<sup>29</sup> 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.<sup>30</sup> 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).<sup>31</sup> 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 (10<sup>th</sup> 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").<sup>32</sup> 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.<sup>33</sup>

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<sup>29</sup>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...").

<sup>30</sup>This memorandum does not address other activities that FLPMA may authorize within grazing districts.

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

<sup>32</sup>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."]

<sup>33</sup>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.").

## **Conclusion**

The Secretary has already determined that the lands within grazing districts are chiefly valuable for grazing. The Secretary need only make a chiefly-valuable-for-grazing determination when the Secretary is creating a district, adding to a district or modifying a grazing district's boundaries. The Secretary may also make a chiefly-valuable-for-grazing determination under section 7 of the TGA to classify lands for any uses other than grazing and raising forage crops or for disposal. Any decision to retire livestock grazing on federal lands is not permanent, unless made permanent through congressional action. Any such decision is subject to reconsideration and reversal during subsequent land use planning.



# United States Department of the Interior

OFFICE OF THE SOLICITOR  
Washington, D.C. 20240

IN REPLY REFER TO:

M-37008

OCT - 4 2002

Memorandum

To: Secretary

From: Solicitor

Subject: Authority for the Bureau of Land Management to Consider Requests for Retiring Grazing Permits and Leases on Public Lands

## Question Presented and Summary Conclusion

I have reviewed a memorandum from my predecessor to the Director of Bureau of Land Management (BLM) dated January 19, 2001, regarding BLM's authority to terminate or "retire" grazing on particular public lands at the request of a rancher who holds a permit or lease (hereafter, "permit") to graze livestock on those lands. I conclude that BLM has such authority but only after compliance with statutory requirements and BLM decides the public lands associated with the permit should be used for purposes other than grazing. A decision by BLM to retire livestock grazing is not permanent. It is subject to reconsideration, modification and reversal in subsequent land use plan decisions.

## Introduction

This opinion examines the specific situation in which a grazing permittee volunteers to relinquish all or part of a permit to graze livestock upon the condition that BLM will permanently retire grazing on the public lands subject to the permit. This situation arises in the context of resource or land use conflicts and may involve an arrangement between a third party, such as a conservation organization, and a permittee. In such a situation, a third party generally offers to purchase the base property on the condition that the associated grazing permit is permanently retired.<sup>1</sup> This arrangement meets the goals of the two private parties only where BLM, after a public land use planning process, makes an independent decision

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<sup>1</sup> This general description is not meant to characterize the only way private parties can reach agreement. A variety of financial arrangements and sale contracts can be used by private parties to acquire private ranches and transfer associated grazing permits. BLM is not a party to these private agreements. While BLM may acknowledge an agreement in the planning process, BLM does its own analysis and makes its own independent decision about devoting public rangelands to a use other than livestock grazing.



regarding the use of the public lands and decides to accept relinquishment of the grazing permit and terminate or “retire” the authorized grazing. However, this “retirement” cannot be considered permanent in nature absent congressional action.<sup>2</sup>

Solicitor Leshy addressed grazing retirement in his January 19, 2001 memorandum. He concluded that BLM could accept relinquished grazing permits through its land use planning process regardless of whether the relinquishment was voluntary or involuntary, although he suggested that voluntary relinquishments should have priority over involuntary relinquishments. He made no distinction between lands within grazing districts and those outside of grazing districts established under the Taylor Grazing Act (TGA). One additional and very important factor concerning grazing relinquishment, whether voluntary or involuntary, must be considered. This factor is that lands within grazing districts have been found to be “chiefly valuable for grazing and the raising of forage crops.” There must be a proper finding that lands are no longer chiefly valuable for grazing in order to cease livestock grazing within grazing districts. Moreover, cessation of grazing may implicate congressional reporting requirements and grazing relinquishment decisions are not permanent.

### **Statutory Framework**

Congressional direction regarding livestock grazing on the public lands is found in the Taylor Grazing Act of 1934, 43 U.S.C. §§ 315-315o-1; the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1701-1782; and the Public Rangelands Improvement Act of 1978 (PRIA), 43 U.S.C. §§ 1901-1908.

In the TGA, Congress authorized the Secretary to identify lands as “chiefly valuable for grazing and raising forage crops,” to place these lands in grazing districts, and to issue permits to qualified applicants. 43 U.S.C. § 315. Lands outside of grazing districts may be leased for livestock grazing. 43 U.S.C. § 315m. The TGA also gives the Secretary the authority to make adjustments to grazing use based on range conditions and to regulate the occupancy and use of the public rangelands in order to preserve the land and its resources from destruction or unnecessary injury and to provide for the orderly use, improvement, and development of the range. 43 U.S.C. § 315a. Under FLPMA, Congress authorized the Secretary to manage public lands on a multiple use and sustained yield basis through land use plans developed with public involvement. 43 U.S.C. § 1712. FLPMA also defines domestic livestock grazing as a “principal or major use.” 43 U.S.C. § 1702(*l*). Lastly, in PRIA Congress recognized the need to manage public rangelands to be as productive as feasible for all rangeland values. 43 U.S.C. §§ 1901(b)(2), 1903(b).

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<sup>2</sup>To avoid confusion, the voluntary relinquishment of a grazing permit is best referred to as just that -- “relinquishment,” not “retirement.”

## Discussion and Analysis

When considering a proposal to cease livestock grazing on public rangelands, BLM must address a number of important land use planning factors. Some of these factors are set forth in the Leshy memorandum and apply whether the lands are within a grazing district or not. When the lands are within a grazing district, as the vast majority of grazing lands are, BLM must also analyze whether the lands are still “chiefly valuable for grazing and raising other forage crops.” 43 U.S.C. § 315. If BLM concludes that the lands still remain chiefly valuable for these purposes, the lands must remain in the grazing district. As such, they would remain subject to applications from other permittees for the forage on the allotment that is relinquished to BLM.

In *Public Lands Council v. Babbitt*, 167 F.3d 1287 (10<sup>th</sup> Cir. 1999), *aff’d on other grounds*, 529 U.S. 728 (2000), the Tenth Circuit struck down a BLM regulation authorizing conservation use permits. These permits authorized permittees not to graze during the entire term of a ten-year grazing permit. The court found a presumption of grazing use within grazing districts and struck down the regulation because it reversed this presumption:

The TGA authorizes the Secretary to establish grazing districts comprised of public lands ‘which in his opinion are chiefly valuable for grazing and raising forage crops.’ 43 U.S.C. § 315. When range conditions are such that reductions in grazing are necessary, temporary non-use is appropriate . . . . The presumption is, however, that if and when range conditions improve and more forage becomes available, permissible grazing levels will rise . . . . The Secretary’s new conservation use rule reverses that presumption. Rather than annually evaluating range conditions to determine whether grazing levels should increase or decrease, as is done with temporary non-use, the Secretary’s conservation use rule authorizes placement of land in non-use for the entire duration of a permit. This is an impermissible exercise of the Secretary’s authority under section three of the TGA because land that he has designated as ‘chiefly valuable for grazing livestock’ will be completely excluded from grazing even though range conditions could be good enough to support grazing. Congress intended that once the Secretary established a grazing district under the TGA, the primary use of that land should be grazing.

*Id.* at 1308. The foregoing language clearly applies in the grazing retirement context. If the Secretary cannot foreclose grazing within a grazing district for a ten year period, the Secretary certainly cannot indefinitely retire grazing within a district.

If BLM determines that lands are no longer chiefly valuable for grazing, BLM must express this determination and support it by proper findings in the record of decision that concludes the land use planning process. For lands outside of grazing districts, this analysis is not necessary because BLM has not made a chiefly valuable determination for these lands.

Another factor is that Congress has recognized livestock grazing as one of the principal or major uses of the public lands. The land use planning process should consider whether discontinuing livestock grazing would implicate congressional reporting requirements. *See* 43 U.S.C. § 1712(e)(2).

Finally, land use planning is a dynamic process. In the future, BLM, through the land use planning process, may designate lands where livestock grazing has ceased as once again available for grazing, as circumstances warrant. A decision to foreclose livestock grazing is not permanent. It is subject to reconsideration, modification and reversal in subsequent land use plan decisions. Only Congress may permanently exclude lands from grazing use.

### **Conclusion**

A permittee cannot force BLM to permanently retire a grazing allotment from grazing use. BLM has the authority to consider, through the land use planning process, a permittee's proposal to relinquish a grazing permit in order to end grazing on the permitted lands and to assign them for another multiple use. If the lands are within an established grazing district, BLM must analyze whether the lands are no longer "chiefly valuable for grazing and raising forage crops" and express its rationale in a record of decision. BLM must also consider whether the elimination of livestock grazing as a principal or major use of the public lands triggers congressional reporting requirements. A decision to cease livestock grazing is not permanent. It is subject to reconsideration, modification and reversal in subsequent land use plan decisions. This memorandum supercedes contrary Solicitor's Office memoranda or opinions.



William G. Myers III