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COMMENT

An End to Grazing Lease Litigation: An Examination of Alternative Dispute Resolution Schemes that Could Resolve the Overgrazing Dispute on State and Federally Owned Rangelands in the Western United States

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I. INTRODUCTION

Ranching of cattle and other animals in the western United States (U.S.) has traditionally been considered the “backbone” of many rural areas and communities.¹ Ranchers have grazed their livestock on vast rangelands since the 1500s in the southwestern U.S. and since the 1800s elsewhere in the West.² Until 1891, the federal government primarily sought to “dispose” of public lands through “[giving] or [selling] millions of acres of the public domain to homesteaders, railroads, and new states, among others.”³ Even with this disposal of lands, a rancher could generally graze his livestock wherever he wished, as long as it was on public land.⁴ In 1934, Congress passed the Taylor Grazing Act,⁵ which regulated grazing on public rangeland by requiring that ranchers first obtain exclusive grazing permits for

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1. Julie Andersen, Note, *Public Lands Council v. Babbitt: Herding Ranchers Off Public Land?*, 2000 BYU L. REV. 1273 (2000).

2. 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, 515 (1997).

3. *Id.* at 519.

4. Andersen, *supra* note 1, at 1273.

5. Taylor Grazing Act of 1934, 43 U.S.C. §§ 315-315(r) (2006).

portions of federal land.⁶ The Taylor Grazing Act, along with the later Federal Land Policy and Management Act of 1976⁷ and the Public Rangelands Improvement Act of 1978,⁸ granted the Secretary of the Interior the authority to develop and promulgate these regulations on public rangeland.⁹ Because of the former federal land disposal policy and the later regulation of grazing on public land, modern grazing generally takes two different forms: (1) grazing on state owned land; and (2) grazing on federal land administered by the Bureau of Land Management or the U.S. Forest Service.

In the western U.S., ranching often requires large areas of public rangeland because landowners collectively own only a small portion of each state as private property. As a result, ranchers often lease or obtain permits for additional portions of public rangeland to augment the land area that will support their livestock. As of January 1, 2006, in Arizona for example, 86% of the state was suitable for livestock grazing and only 16% of this land was privately owned.¹⁰ However, in order to increase profitability and compete with others, ranchers have tended to increase their herd sizes to the point that they overgraze and damage the rangeland ecosystem.¹¹ Consequently, public land's ability to sustain native flora and fauna has decreased.¹² Environmental organizations, observing this decline in the ecosystem, argue that grazing causes significant environmental damage. They want livestock either removed from public land that has been overgrazed or at least reduced in number.¹³ On both state and federally owned rangeland, environmental

6. Andersen, *supra* note 1, at 1273.

7. Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701-1785 (2006).

8. Public Rangelands Improvement Act of 1978, 43 U.S.C. §§ 1901-1908 (2006).

9. *See generally* Pendery, *supra* note 2, at 515, 519-22.

10. ARIZ. COOP. EXTENSION, COLL. OF AGRIC. & LIFE SCIS., UNIV. OF ARIZ., BEEF CATTLE ON ARIZ. RANGELANDS: RESEARCH, EDUCATION AND FACILITIES DEDICATED TO PRODUCING WHOLESOME FOOD 4 (2007), http://cals.arizona.edu/extension/marketing/outreach_materials/beef_cattle.pdf.

11. *See generally* Oregon Natural Desert Association, Public Lands Grazing, <http://www.onda.org/protecting-wildlife-and-clean-water/public-lands-grazing> (last visited Oct. 26, 2009).

12. *Id.*

13. Andersen, *supra* note 1, at 1274.

organizations have pursued a strategy of both participation in grazing lease auctions and, when that does not work, litigation to remove or reduce livestock from public land.¹⁴ This litigation has tended to be time-consuming, is costly to the administrative agencies managing public lands,¹⁵ and has created an extremely hostile public and legislative reaction to the environmental organizations and their interests.¹⁶

This comment will discuss the litigation associated with environmental organizations' attempts to out-bid ranchers and ranching associations for public grazing leases on state and federally owned rangeland in the western U.S. Section II of this comment will examine the history of state and federally owned rangeland and its auction process. Section III will discuss several environmental organizations and their interests in rangeland protection, and Section IV will describe the grazing lease litigation problem in detail. Section V will analyze the negative legislative and agency reactions to environmental organizations' legal victories. Finally, in Section VI, this comment will propose state and federal legislation and agency regulatory changes designed to encourage the adoption of alternative dispute resolution techniques to reduce or eliminate western grazing lease litigation.

II. HISTORY AND PURPOSE OF PUBLIC GRAZING LAND

There is a great deal of public rangeland throughout the western U.S. that is used by ranchers and ranching associations to graze livestock. The U.S. granted some of this rangeland to individual states when they were admitted into the Union. The

14. See *Guardians v. Wells*, 34 P.3d 364 (Ariz. 2001); *Idaho Watersheds Project v. State Bd. Land Comm'rs*, 918 P.2d 1206 (Idaho 1996) [hereinafter *IWP I*] (illustrating representative grazing rights litigation).

15. See Stacey Allison, Comment, *Going Once, Going Twice, Sold: Implications for Leasing State Trust Lands to Environmental Organizations and Other High Bidders*, 25 PUB. LAND & RESOURCES L. REV. 39, 49-50 (2004).

16. See ARIZ. CATTLEMEN'S ASS'N, BIDDING WARS: FOREST GUARDIANS SETS ITS SIGHT ON NORTHEASTERN ARIZONA STATE GRAZING LEASE—SAYS IT WILL NOT PAY FOR IMPROVEMENTS THAT WERE NOT PAID FROM PERSONAL FUNDS (2008), <http://www.azcattlemensassoc.org/documentz/apr2008/KnightsGrazingLawsuitLong.pdf> [hereinafter ARIZ. CATTLEMEN'S ASS'N BIDDING WARS].

federal government owns the rest, which is administered by various federal agencies.

A. State Managed Rangeland

It was federal policy to dispose of public domain land until 1891,¹⁷ when the federal government shifted to retaining much of it for internal management and administration.¹⁸ When expanding the Union westward, Congress had to determine whether the federal government or new state governments should retain ownership of the public domain land comprising much of the western territories.¹⁹ In the end, millions of acres of public domain land were granted to the new states so that any sale or lease revenues generated from them would support the establishment and maintenance of state public schools.²⁰ Two states in particular are home to prodigious litigation by environmental organizations regarding grazing leases on these school lands—Arizona and Idaho.

In Arizona, state owned rangeland is any land entrusted to the state under the Arizona New Mexico Enabling Act (Enabling Act).²¹ As mentioned above, Congress reserved much of this land to support state public schools.²² Historically, Arizona accomplished this objective through the sale or auction of grazing leases on the land.²³ The Enabling Act prohibited any sale or lease of the school-trust land unless it was to the “highest and best bidder at a public auction.”²⁴ In light of the dissipation of

17. Pendery, *supra* note 2, at 519.

18. *Id.* at 520.

19. See Arizona New Mexico Enabling Act, 61st Cong., ch. 310, §§ 24-25, 28, 36 Stat. 557, 572-76 (1910) (*amended by* New Mexico Statehood and Enabling Act Amendments of 1997, Pub. L. No. 105-37, 111 Stat. 1113 (1997)); *see also An Act To Provide For The Admission Of The State Of Idaho Into The Union*, 51st Cong., 656-57 (1890) (no current effective sections).

20. *Id.*

21. Arizona New Mexico Enabling Act, 61st Cong., ch. 310, §§ 24-25, 28, 36 Stat. 557, 572-76 (1910), *amended by* New Mexico Statehood and Enabling Act Amendments of 1997, Pub. L. No. 105-37, 111 Stat. 1113 (1997).

22. *Id.* § 25.

23. ARIZ. REV. STAT. ANN. § 37-132(A)(5)-(6) (2008).

24. Arizona New Mexico Enabling Act, ch. 310, § 28, 36 Stat. 557, 574 (1910), *amended by* New Mexico Statehood and Enabling Act Amendments of 1997, Pub. L. No. 105-37, 111 Stat. 1113 (1997).

land assets granted to other states after their admission into the Union,²⁵ Congress specifically wrote the Enabling Act so that it would “severely circumscribe the power of the state government to deal with the assets of the common school trust.”²⁶ Members of Congress were upset that corrupt state legislatures had permitted the disposal of school lands in ways that did not raise the money necessary to support public schools.²⁷ The Arizona Constitution adopted by reference large sections of the Enabling Act,²⁸ and the Arizona Legislature drafted laws that provided for the administration of the school-trust lands by the Arizona State Land Department (SLD) pursuant to the Arizona Constitution.²⁹

Under Section 37-102 of this legislation, the SLD was tasked with administering “all laws relating to lands owned by, belonging to, and under the control of the state.”³⁰ Therefore, the SLD is in charge of the school-trust land granted to the state under the Enabling Act. In performing its administrative duties, the SLD subsequently classified much of the school-trust land as land suited only for grazing because it had “no other practicable use.”³¹ In order to support the public schools of Arizona, the SLD leases the land classified for grazing to ranchers through a public auction process, which raises revenue for the maintenance of the schools.³² The Commissioner of the SLD, as provided by statute, awards the leases to the “highest and best bidder.”³³

Idaho state rangelands have a similar history to those of Arizona. Congress granted these rangelands to Idaho in the Idaho Admission Act (Admission Act),³⁴ mandating that the rangelands be “disposed of only at public sale, the proceeds to constitute a permanent school fund, the interest of which only

25. *Kadish v. Ariz. State Land Dep’t*, 747 P.2d 1183, 1186 (Ariz. 1987).

26. *Id.*

27. *Id.*

28. ARIZ. CONST. art. X, §§ 1-11.

29. ARIZ. REV. STAT. ANN. § 37-102(A),(B),(F) (2008).

30. *Id.* § 37-102(A).

31. *Guardians v. Wells*, 34 P.3d 364, 370-71 (Ariz. 2001) (citing ARIZ. REV. STAT. ANN. § 37-101(7) (2001), to define “grazing lands”).

32. *Guardians v. Wells*, 34 P.3d 364, 366 (Ariz. 2001).

33. *Id.* at 371 (citing ARIZ. CONST. art. X, § 8).

34. *An Act to Provide for the Admission of the State of Idaho into the Union*, 51st Cong., 1st Sess., ch. 656-57, 26 Stat. 215, 216 (1890) (no current effective sections).

shall be expended in the support of said schools.”³⁵ These lands could, however, be leased for ten-year periods.³⁶ As in Arizona, the Idaho Constitution incorporated the school land grants specified in the Admission Act.³⁷ Idaho mandates that any earnings from the school-trust lands be used to maintain state schools.³⁸ The Idaho State Board of Land Commissioners (SBLC), as provided for by Section 7 of the Idaho Constitution,³⁹ is charged with providing for “the location, protection, sale or rental of all the lands” of the public school land endowment.⁴⁰

B. Federally Managed Rangeland

For grazing lease litigation purposes, federal public land can be divided into two general categories—that administered by the Bureau of Land Management (BLM) and that administered by the U.S. Forest Service (Forest Service). The BLM is an administrative unit of the Department of the Interior,⁴¹ and the Forest Service is an administrative unit of the Department of Agriculture.⁴² Each agency is responsible for vast expanses of land owned by the federal government.⁴³

The BLM is “responsible for the majority of federally-managed rangeland,”⁴⁴ and even though some grazing occurs on National Forest System land, “grazing is most commonly associated with the BLM.”⁴⁵ The Taylor Grazing Act of 1934 (TGA) was the first federal legislation that substantially regulated grazing on most non-Forest Service federal public land.

35. *Id.* § 5.

36. Sally K. Fairfax & Andrea Issod, *Trust Principles As a Tool for Grazing Reform: Learning from Four State Cases*, 33 ENVTL. L. 341, 360 (2003).

37. *Id.* at 359-60.

38. *Id.*

39. IDAHO CONST. art. IX, § 7.

40. *Id.* § 8.

41. Bureau of Land Management, About the BLM, Detailed History, BLM and Its Predecessors, http://www.blm.gov/wo/st/en/info/About_BLM/History.html (last visited Oct. 26, 2009).

42. U.S. Forest Service, About Us—Meet the Forest Service, <http://www.fs.fed.us/aboutus/meetfs.shtml> (last visited Oct. 26, 2009).

43. *Id.* See also Bureau of Land Management, *supra* note 41.

44. Scott Nicoll, *The Death of Rangeland Reform*, 21 J. ENVTL. L. & LITIG. 47, 61 (2006).

45. *Id.*

The TGA authorized the Secretary of the Interior to establish grazing districts⁴⁶ and issue “permits to graze livestock on such grazing districts.”⁴⁷ However, the regulation and adjudication processes under the TGA were unwieldy and somewhat limited the Act’s effectiveness.⁴⁸ The Interior Department created the BLM itself in 1946 to streamline some of this regulation and adjudication.⁴⁹

Thirty years later, Congress rectified some long-standing problems with the TGA by passing the Federal Land Policy and Management Act (FLPMA)⁵⁰ to provide the BLM with the statutory authority to manage public rangeland within its jurisdiction similar to that enjoyed by the Forest Service.⁵¹ In addition, Congress required in FLPMA that the BLM manage public rangeland “under principles of multiple use and sustained yield”⁵² so that many types of scientific, recreational, and environmental non-use values could be protected.⁵³

Concerned that FLPMA did not do enough to protect rangeland resources, Congress in 1978 enacted the Public Rangelands Improvement Act (PRIA).⁵⁴ Under PRIA, Congress determined that “vast segments of the public rangelands [were] producing less than their potential for livestock, wildlife habitat, recreation, forage, and water and soil conservation benefits, and for that reason [were] in an unsatisfactory condition.”⁵⁵ Congress then reaffirmed the national policy of managing, maintaining, and improving the condition of federal public rangelands so that they would “become as productive as feasible for all rangeland

46. Andersen, *supra* note 1, at 1274 (citing LYNN JACOBS, WASTE OF THE WEST: PUBLIC LANDS RANCHING (1992)).

47. *Id.* at 1277.

48. *See id.* at 1278.

49. *See* Bureau of Land Management, *supra* note 41.

50. Federal Land Policy and Management Act of 1976, 43 U.S.C §§ 1701-1787 (2006).

51. Andersen, *supra* note 1, at 1279.

52. 43 U.S.C § 1732(a) (2006).

53. *Id.* § (a)(8).

54. Public Rangelands Improvement Act of 1978, 43 U.S.C. §§ 1901-1908 (2006).

55. *Id.* § 1901(a)(1).

values in accordance with management objectives and the land use planning process established” under FLPMA.⁵⁶

Forest Service rangeland, like that administered by the BLM, has a complicated regulatory history. In 1891, Congress passed the Forest Reserve (Creative) Act,⁵⁷ which granted then-President Harrison authority to establish Forest Reserves out of the public domain land.⁵⁸ Harrison used the authority to reserve about thirteen million acres, although the designations only amounted to largely ceremonial map demarcations because Congress provided no funding for federal management.⁵⁹ In 1897, Congress finally provided this funding and stated that “[national forests shall not be established except to] protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States.”⁶⁰ In 1905, Congress, at the urging of European-trained forester Gifford Pinchot,⁶¹ “transferred the forest reserves to the Department of Agriculture, named them national forests, and created the Forest Service to manage them.”⁶² Under Pinchot,⁶³ one of the Forest Service’s central purposes became the commercial sale of timber to avoid potential future timber shortages.⁶⁴ The practice of encouraging commercial timber sales continued until 1960 when Congress passed the Multiple-Use Sustained-Yield Act (MUSY).⁶⁵ MUSY was designed to promote the protection of “recreation, wildlife, and fish and range

56. *Id.* § 1901(b)(2).

57. Rebecca Smith, *Lands Council v. Powell and the Ninth Circuit’s Refusal to Blindly Defer to Unreliable Forest Service Science*, 28 PUB. LAND & RES. L. REV. 65, 69 (2007).

58. Jack Tuholske & Beth Brennan, *The National Forest Management Act: Judicial Interpretation of a Substantive Environmental Statute*, 15 PUB. LAND L. REV. 53, 57 (1994).

59. *Id.*

60. Public Law Appropriations, Sundry Civil Lieu Lands Act (Forest Reservations), 16 U.S.C. § 475 (2006).

61. Tuholske & Brennan, *supra* note 58, at 58.

62. *Id.* at 57-58; Transfer Act of 1905, ch. 288, § 1, 33 Stat. 628 (codified as amended at 16 U.S.C. § 472 (2006)).

63. Tuholske & Brennan, *supra* note 58, at 58.

64. *Id.*

65. Multiple-Use Sustained Yield Act of 1960, 16 U.S.C. §§ 528-531 (2006).

resources” in addition to general timber management.⁶⁶ In 1976, Congress passed the National Forest Management Act (NFMA).⁶⁷ Under NFMA, Congress required that the Forest Service begin a “nationwide forest planning process for each of the 156 separate units of the National Forest System.”⁶⁸ The forest plans resemble zoning maps, and they are used to divide all of the National Forests into different “Management Areas.”⁶⁹ Forest plans also contain many procedural “standards and guidelines that control the types of activity that may occur”⁷⁰ within each Management Area. Some areas are zoned for “wildlife winter range, riparian areas, semi-primitive recreation, and timber production/wildlife,” in addition to other uses.⁷¹ One of those other uses happens to be livestock grazing.

Contrary to what one might expect, the Forest Service has long considered livestock grazing a legitimate and reasonable use.⁷² Since 1897, Congress has allowed the Forest Service to control the permits, herd size, allotments, and season of use in order to prevent any monopolization of rangeland by large commercial grazing operations.⁷³ Current Forest Service regulations recognize that it continues to be the “policy of Congress that the National Forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes,”⁷⁴ and that the policy requires that the Forest Service “develop, administer and protect the range resources and permit and regulate the grazing use of all kinds and classes of livestock on all National Forest System lands and on other lands under Forest Service control.”⁷⁵ Currently, the Forest Service divides land available for grazing into

66. Tuholske & Brennan, *supra* note 58, at 59.

67. National Forest Management Act of 1976, 16 U.S.C. §§ 1600-1614 (2006).

68. Tuholske & Brennan, *supra* note 58, at 65.

69. *Id.*

70. *Id.*

71. *Id.*

72. U.S. Forest Service, U.S. Dep’t of Agric., Rangelands, *Why does the forest service permit livestock grazing on NFS land?*, <http://www.fs.fed.us/rangelands/uses/allowgrazing.shtml> (last visited on Oct. 26, 2009).

73. *Id.* (citing WILLIAM D. ROWLEY, FOREST SERVICE GRAZING AND RANGELANDS: A HISTORY (1985)).

74. *Id.*

75. 36 C.F.R. § 222.1(a) (2009).

“Grazing Allotments”⁷⁶ and permits grazing on them only after the development of an “Allotment Management Plan” (AMA).⁷⁷ These plans “prescribe 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 as determined for the lands involved.”⁷⁸ Each AMA takes into account what uses are both appropriate and feasible, and any subsequent grazing is “planned and managed taking into consideration all the other uses of the area.”⁷⁹

III. ENVIRONMENTAL ORGANIZATIONS AND THEIR INTERESTS IN PUBLIC RANGELAND

Because of the perceived environmental damage caused by overgrazing, many organizations have formed to promote healthy grassland ecosystems by litigating issues involving grazing leases. These organizations operate predominately in the western U.S. where overgrazing is most prevalent. Especially successful organizations include WildEarth Guardians, the Western Watersheds Project, the Center for Biological Diversity, and the Oregon Natural Desert Association.

A. Rangeland Protection Organizations

WildEarth Guardians is a nonprofit organization based out of Santa Fe, New Mexico.⁸⁰ Once known as Forest Guardians, it merged with Sinapu, another regional environmental organization, and changed its name in 2008.⁸¹ The new organizational structure enabled WildEarth Guardians to expand its activities to areas in the western U.S. outside of Arizona and New Mexico,⁸² and it now maintains offices in Arizona, Montana, Colorado, and

76. *Id.* § 222.2(a).

77. *Id.* § 222.2(b).

78. *Id.* § 222.1(a)(2)(i).

79. *Id.*

80. WildEarth Guardians, Meet Our Staff, <http://www.wildearthguardians.org/AboutUs/MeetOurStaff/tabid/95/Default.aspx> (last visited Oct. 26, 2009).

81. WildEarth Guardians, Conservation Groups Merge to Create a Force for the American West’s Wild Places, Wildlife, and Wild Rivers, <http://www.wildearthguardians.org/library/paper.asp?nMode=1&nLibraryID=590> (last visited Oct. 26, 2009).

82. *Id.*

California.⁸³ WildEarth Guardians, in its mission statement, purports to “[protect] and [restore] wildlife, wild rivers, and wild places in the American West.”⁸⁴ WildEarth Guardians’ wildlife program aims to “[prevent] extinction and [promote] recovery of imperiled native plants and animals in the West,”⁸⁵ and the organization advocates federal endangered species listing for those species at risk because of habitat loss caused by “logging, mining, livestock grazing, [and] oil and gas extraction.”⁸⁶ WildEarth Guardians monitors federally listed species to ensure that any protective measures are effective.⁸⁷ The organization’s wild places program is dedicated to protecting “public and private land from destruction and restores previously damaged areas throughout the West.”⁸⁸

The Western Watersheds Project (WWP) is a “non-profit conservation group founded in 1993 with 2000 members and field offices in Idaho, Montana, Utah, Wyoming, Arizona and California.”⁸⁹ WWP began as the Idaho Watersheds Project (IWP) and is based in Hailey, Idaho.⁹⁰ IWP was so successful in grazing lease litigation in Idaho during the 1990’s that it changed its name to WWP and expanded operations to other states. The organization’s goal is to “influence and improve public lands management in [eight] western states with a primary focus on the negative impacts of livestock grazing on 250,000,000 acres of western public lands.”⁹¹ To accomplish this goal, WWP has actively participated with WildEarth Guardians, the Center for Biological Diversity, and the Oregon Natural Desert Association

83. WildEarth Guardians, Meet Our Staff, *supra* note 80.

84. WildEarth Guardians, WildEarth Guardians, <http://www.wildearthguardians.org/> (last visited Oct. 26, 2009).

85. WildEarth Guardians, Wildlife, <http://www.wildearthguardians.org/Wildlife/tabid/66/Default.aspx> (last visited Oct. 26, 2009).

86. *Id.*

87. *Id.*

88. WildEarth Guardians, Wild Places, <http://www.wildearthguardians.org/WildPlaces/tabid/72/Default.aspx> (last visited Oct. 26, 2009).

89. Western Watersheds Project, About WWP, Mission and Partnerships, <http://westernwatersheds.org/about> (last visited Oct. 26, 2009).

90. *Id.*

91. *Id.*

in jointly bringing lawsuits to prevent overgrazing and grazing lease awards for individuals that habitually permit overgrazing.⁹²

The Center for Biological Diversity (CBD) is a non-profit membership organization based in Tucson, Arizona.⁹³ It has approximately 200,000 active members⁹⁴ and has field offices in Alaska, California, Illinois, Minnesota, Montana, Nevada, New Mexico, Oregon, Vermont, and Washington, D.C.⁹⁵ CBD has used evidence of “cattle-grazing abuses on the public lands where they lived” to obtain judicial orders to “remove cows from hundreds of miles of vulnerable desert streams” in order to protect species like the southwestern willow flycatcher.⁹⁶ CBD also successfully ended “major timber operations through-out Arizona and New Mexico and brought an end to large-scale industrial logging in the heritage public lands of the arid Southwest” in order to protect threatened goshawks and owls.⁹⁷

Finally, the Oregon Natural Desert Association (ONDA) is a “1,200-member grassroots organization”⁹⁸ that works to protect and restore the biological integrity of Oregon’s desert ecosystems.⁹⁹ This has been accomplished by advocating that desert ecosystems receive congressional wilderness designations and protection pursuant to the Wilderness Act of 1964.¹⁰⁰ When the BLM refuses to propose such designations, ONDA litigates to force the issue.¹⁰¹

92. *Id.* See also *Oregon Natural Desert Ass’n v. Bureau of Land Mgmt.*, 531 F.3d 1114 (9th Cir. 2008).

93. Center for Biological Diversity, About the Center, Contact Us, <http://www.biologicaldiversity.org/about/contact/index.html> (last visited Oct. 26, 2009).

94. Center for Biological Diversity, Support, Support the Center, <http://www.biologicaldiversity.org/support/index.html> (last visited Oct. 26, 2009).

95. Center for Biological Diversity, About the Center, Contact Us, *supra* note 93.

96. Center for Biological Diversity, About the Center, Our Story, <http://www.biologicaldiversity.org/about/story/index.html> (last visited Oct. 26, 2009).

97. *Id.*

98. Oregon Natural Desert Association, About Us, <http://www.onda.org/about> (last visited Oct. 26, 2009).

99. *Id.*

100. Wilderness Act of 1964, 16 U.S.C. §§ 1131-1136 (2006).

101. See generally *Oregon Natural Desert Ass’n v. Rasmussen*, 451 F.Supp.2d 1202 (D. Or. 2006) [hereinafter *ONDA v. Rasmussen*].

B. Environmental Organization Interests in Public Rangeland

Rangeland protection organizations consider overgrazing such a problem because it greatly damages grassland flora and fauna. For CBD, the increased defoliation and plant trampling that leads to soil erosion and water sedimentation threatens many species of grassland herbivores, avian predators, and fish.¹⁰² For ONDA, overgrazing damages an already delicate high desert ecosystem.¹⁰³ Overgrazing depletes desert grasses and vegetation, and the lack of moisture serves as an impediment to their quick renewal.¹⁰⁴ Once the vegetation is removed, what little nutrients exist in the soil are quickly lost to wind erosion.¹⁰⁵ For some organizations like WildEarth Guardians, the interest in overgrazing is twofold: (1) prevent loss of habitat for native flora and fauna; and (2) prevent the degradation of a resource designed and dedicated to the continuing maintenance of public schools.¹⁰⁶

If overgrazing is such a major environmental problem, one might ask why ranchers and ranching organizations allow it to happen since it affects them too. There is no easy answer, but the principles outlined in the “Tragedy of the Commons” concept may explain why ranchers and ranching organizations have allowed overgrazing.¹⁰⁷ There are vast acreages of public land in the

102. See generally Oregon Natural Desert Association, Public Lands Grazing, *supra* note 11; see generally NAT'L RES. DEFENSE COUNCIL & EARTHJUSTICE, LIVESTOCK GRAZING AND THE ENVIRONMENT 3 (2009), http://www.earthjustice.org/library/factsheets/grazing_enviro_effects.pdf.

103. See generally Oregon Natural Desert Association, Public Lands Grazing, *supra* note 11.

104. *Id.*

105. NAT'L RES. CONSERVATION SERV., U.S. DEPARTMENT OF AGRIC., RANGELAND SOIL QUALITY—WIND EROSION 2 (2001), <http://soils.usda.gov/SQI/management/files/RSQIS10.pdf>.

106. See generally *Guardians v. Wells*, 34 P.3d 364 (Ariz. 2001); see also *Idaho Watersheds Project v. State Bd. Land Comm'rs*, 982 P.2d 367 (Idaho 1999) [hereinafter *IWP II*].

107. See generally Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243, 1243-48 (1968). The “Tragedy of the Commons” is a process by which multiple individuals will independently and rationally act in their own interests to destroy a finite public resource, even if this destruction damages everyone in the long-term. *Id.*

western U.S.,¹⁰⁸ so ranchers may believe that they could always move their herds onto another grazing allotment if the one they use becomes overgrazed and can no longer sustain large herds.¹⁰⁹ Because the ranchers do not own the public land, there may be no real incentive to prevent degradation.¹¹⁰

IV. GRAZING LEASE LITIGATION PROBLEM

Even though overgrazing is a serious environmental problem, rangeland protection organizations' litigation to take grazing leases away from those who allow overgrazing has arguably become a bigger problem because it has created a public relations nightmare.¹¹¹ On state owned rangeland, environmental organizations have litigated to prevent overgrazing and to ensure that school-trust land is healthy enough to support the public schools into the distant future.¹¹² On BLM land, ranching organizations have litigated furiously to prevent any reform of federal rangeland management, and environmental organizations have responded with lawsuits to remove livestock to protect ecosystem health.¹¹³ Finally, on Forest Service land, environmental organizations have litigated to simply prevent any grazing leases from going to ranchers who overgraze.¹¹⁴

108. See Bureau of Land Management, U.S. Department of the Interior, About the BLM, http://www.blm.gov/wo/st/en/info/About_BLM.html (last visited Oct. 26, 2009); see U.S. Forest Service, *Why does the forest service permit livestock grazing on NFS land?*, *supra* note 71.

109. Hardin, *supra* note 107, at 2.

110. *Id.* at 2.

111. See generally ARIZ. CATTLEMEN'S ASS'N, BIDDING WARS, *supra* note 16.

112. *Id.* See, e.g., Press Release, WildEarth Guardians, Cattle Grazing on Public Lands Must Account for Endangered Wildlife: 9th Circuit Court of Appeals Sides with Conservationists (June 20, 2006), available at <http://www.wildearthguardians.org/library/paper.asp?nMode=1&nLibraryID=356>; see also Guardians v. Wells, 34 P.3d 364 (Ariz. 2001).

113. See generally Public Lands Council v. Babbitt, 529 U.S. 728 (2000) [hereinafter *Public Lands Council III*].

114. Oregon Natural Desert Ass'n v. Bureau of Land Mgmt., 531 F.3d 1114 (9th Cir. 2008); Forest Guardians v. U.S. Forest Service, No. Civ. 05-0372 JBDJS, 2005 WL 3663717 (D. N.M. Dec. 13, 2005).

A. Arizona School-Trust Land Grazing Litigation

In Arizona, environmental organizations historically have not had much success in preventing ranchers' livestock from overgrazing on school-trust land.¹¹⁵ This pattern of failure¹¹⁶ changed dramatically in 2001 with the landmark Arizona Supreme Court ruling in *Guardians v. Wells*.¹¹⁷ In this case, Forest Guardians and Jonathan Tate applied for two different grazing leases of school-trust land. Forest Guardians applied for a "ten-year lease on approximately 5,000 acres of school-trust grazing land" in Coconino County, Arizona, and 162 acres in Santa Cruz County, which was at the other end of the state.¹¹⁸ Tate applied for almost 16,000 acres of school-trust grazing land in Pinal County, Arizona, north of Tucson.¹¹⁹ Both Forest Guardians and Tate offered to pay double the amount offered by the then-current lessees when the leases came up for renewal.¹²⁰ Both parties informed the Commissioner of the SLD that the leased land would not be grazed; instead, it would be "rested" for the entire period of the lease so that it could recover from apparent overgrazing by the then-current and previous lessees.¹²¹ The Commissioner subsequently denied both of these applications.¹²² After an arduous appeals process, the Arizona Supreme Court concluded that the Commissioner had ignored his constitutional duty to consider whether the high bids were in the best interest of the trust¹²³ and determined that environmental organizations in Arizona could bid on and be awarded grazing leases with the intention of letting the land rest for the entirety of the lease.¹²⁴

115. *Guardians*, 34 P.3d at 364.

116. *Id.* at 366.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Guardians v. Wells*, 34 P.3d 364, 366-77 (Ariz. 2001).

122. *Id.* at 367.

123. *Id.* at 372.

124. *Id.* at 371-73.

B. Idaho Public School Land Endowment Grazing Litigation

The environmental litigation over grazing leases in Idaho is much more complicated than that in Arizona. IWP and later WWP have undertaken much of the litigation.¹²⁵ In Idaho, litigation over grazing leases on public school land functionally began in 1993.¹²⁶ On Sept. 23 of that year, rancher William E. Ingram filed an application with the Idaho SBLC to renew his 640-acre grazing lease.¹²⁷ At the same time, IWP filed an application to lease the same land subdivision.¹²⁸ After a contentious auctioning process, in which IWP was the high-bidder for the lease, the SBLC awarded the lease to Ingram.¹²⁹ IWP appealed, and the Idaho Supreme Court eventually held that the SBLC failed to “provide for the location, protection, sale, or rental of all the lands . . . in such manner as will secure the maximum long-term financial return to the institution to which granted or to the state if not specifically granted.”¹³⁰ The court also used the legislature’s authority, as granted by Section 8 of the Idaho Constitution, and case law to determine that any bids on grazing leases must be for the “greatest possible amount for the lease of school lands for the benefit of school funds.”¹³¹ Subsequently, the court reversed the decision of the SBLC and ordered that new bid auctions take place so that the high-bidder could be awarded the lease.¹³²

In 1999, IWP was again involved in litigation because it was prevented from bidding on grazing leases.¹³³ After IWP’s victory in 1996, the Idaho Legislature amended the Idaho Code by adding a provision that required that the SBLC weigh the benefit

125. See Western Watersheds Project, WWP Litigation, <http://westernwatersheds.org/legal/legal.html> (last visited Oct. 26, 2009).

126. *IWP I*, *supra* note 14, at 1206.

127. *Id.* at 1207.

128. *Id.*

129. *Id.* at 1208.

130. *Id.* at 1209 (quoting IDAHO CONST. art. IX, § 8).

131. *Id.* at 1209-10 (citing IDAHO CONST. art. IX, § 8, *also citing* East Side Blaine County Livestock Ass’n v. State Bd. Land Comm’rs, 198 P. 760 (Idaho 1921)).

132. *IWP I*, *supra* note 14, at 1211-12.

133. *IWP II*, *supra* note 106, at 367-69.

of lease bids for the schools, the state's interest in a healthy ranching industry, and the increased tax revenue from such industry.¹³⁴ The Idaho Supreme Court held that this provision was unconstitutional with Article IX, Section 8 of the state constitution¹³⁵ and ordered that new auctions be held so that IWP could participate.¹³⁶

C. BLM Litigation

Grazing lease litigation on BLM land took a markedly different path from comparable litigation on state rangeland because BLM is a federal agency. On BLM land, ranching organizations brought roughly half of the major lawsuits in response to federal rangeland regulatory reforms. Environmental organizations brought lawsuits largely in response to the eventual failure of these regulatory reforms and focused on removing livestock from BLM land that the organizations believed should receive wilderness designations. In order to understand why the litigation occurred, one must be thoroughly familiar with the rangeland management reform process undertaken during the 1990s.

1. Rangeland Reform '94

Although Congress passed both FLPMA¹³⁷ and PRIA¹³⁸ in order to improve rangeland management, these Acts were only modestly successful. The BLM has consistently "failed to exercise its modest authority to limit the ecological damage inflicted by intensive grazing."¹³⁹ In 1993, the Clinton Administration Secretary of the Interior, Bruce Babbitt, attempted to address this continuing environmental damage through the development

134. IDAHO CODE ANN. § 58-310B(2)(a) (2008), *invalidated by IWP II*, *supra* note 106.

135. *IWP II*, *supra* note 106, at 369.

136. *Id.* at 371.

137. Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701-1787 (2006).

138. Public Rangelands Improvement Act of 1978, 43 U.S.C. §§ 1901-1908 (2006).

139. Nicoll, *supra* note 44, at 50-51.

of Rangeland Reform '94,¹⁴⁰ the "first significant proposal to reform grazing practices since the enactment of PRIA in 1978."¹⁴¹ Rangeland Reform '94 was designed to implement regulations whereby domestic livestock would be "managed to minimize their detrimental impact on federal rangeland."¹⁴² The proposed regulatory changes purported "(1) to improve administration of the BLM grazing program, (2) to restore and improve the ecological condition of the rangeland, and (3) to establish a 'fair and equitable grazing fee.'"¹⁴³ Rangeland Reform '94's proposed implementation of national standards and guidelines were designed to ensure that "grazing did not interfere with properly functioning ecosystems,"¹⁴⁴ and the proposed increase in grazing fees "attempted to establish a fee structure that would result, over the course of three years, in a fee that more closely represented the fair market value of the forage on federal land."¹⁴⁵

Ranchers and ranching organizations reacted negatively to the proposed reforms¹⁴⁶ and believed that they would end private grazing on BLM land.¹⁴⁷ Babbitt successfully negotiated a compromise with Congressional Democrats in order to pass Rangeland Reform '94 as part of an appropriations bill.¹⁴⁸ Democrats in the U.S. House of Representatives easily passed the bill, but western Senators, frustrated and angered by the proposed regulations, "successfully filibustered and prevented the Senate from considering the range reforms attached to [it]."¹⁴⁹ On November 9, 1993, the western Senators removed the rangeland reforms from the appropriations bill, and Babbitt was forced to pursue an administrative reform solution.¹⁵⁰

140. *Id.* at 52.

141. *Id.* at 52-53.

142. *Id.* at 59-60.

143. *Id.* at 62.

144. *Id.* at 64.

145. Nicoll, *supra* note 44, at 65.

146. See Valerie Richardson, *Babbitt's "Green" Policies Provoke Anger in West*, WASH. TIMES, Nov. 14, 1993, at A1.

147. Nicoll, *supra* note 44, at 66.

148. *Id.* at 66-7.

149. *Id.* at 67.

150. *Id.*

The BLM promulgated the proposed administrative rangeland reform regulations on March 25, 1994, in a somewhat weaker form than they had appeared in the defeated legislative effort.¹⁵¹ After extensive public comment, the BLM promulgated the final rangeland reform regulations on February 22, 1995.¹⁵² The final regulations were quite different than the proposed rules. First, the “proposed grazing-fee increase was eliminated from the final version.”¹⁵³ In addition, the effective date of the regulations was delayed by six months, ensuring that “[they] would not apply to the 1995 grazing season.”¹⁵⁴ This meant that ranchers and ranching associations had almost a year to persuade the friendlier Republican Congress to pass a legislative override of the rangeland reform regulations.¹⁵⁵ However, the Fundamentals of Rangeland Health (FRH), a key component of Rangeland Reform ’94,¹⁵⁶ were part of the final regulations. The FRH allowed the BLM to “modify grazing practices” to restore and protect proper watershed function, endangered species habitat, and ecological processes.¹⁵⁷ Finally, “the authorized officer [would] take appropriate action”¹⁵⁸ whenever “ecological conditions [were] not being met.”¹⁵⁹ After prospects faded for a legislative override of the rangeland reform regulations,¹⁶⁰ ranching interests prepared to overturn them through the judiciary.¹⁶¹

2. Ranching Organization Litigation Over

151. *Id.* at 70; see also Grazing Administration—Exclusive of Alaska, 59 Fed. Reg. 14,314 (proposed Mar. 25, 1994) (to be codified at 43 C.F.R. pts. 4, 1780, 4100).

152. See Administration of Livestock Grazing—Exclusive of Alaska, 60 Fed. Reg. 9894 (proposed Feb. 22, 1995) (to be codified at 43 C.F.R. pts. 1780, 4100).

153. Nicoll, *supra* note 44, at 73.

154. *Id.* at 74.

155. *Id.*

156. *Id.*

157. *Public Lands Council v. U.S. Dep’t of Interior Sec’y*, 929 F. Supp. 1436, 1448 (D. Wyo. 1996) [hereinafter *Public Lands Council I*]; see also Administration of Livestock Grazing—Exclusive of Alaska, 60 Fed. Reg. 9894, 9898 (Feb. 22, 1995); see also 43 C.F.R. § 4180.1 (1995).

158. 43 C.F.R. § 4180.1 (1995).

159. Nicoll, *supra* note 44, at 75.

160. *Id.*

161. *Id.* at 75-76.

Regulatory Reform

The Public Lands Council, a ranching association, and several other grazing organizations filed suit against Babbitt in order to declare that ten provisions of the rangeland reform regulations were an arbitrary and capricious exercise of Babbitt's authority as Secretary of the Interior.¹⁶² The District Court in Wyoming upheld six of the ten challenged provisions—including the FRH provision—as valid exercises of Babbitt's statutory authority¹⁶³ under the TGA.¹⁶⁴ Babbitt appealed to the Tenth Circuit, which held that three of the four provisions ruled unconstitutional by the District Court were, in fact, also valid exercises of his authority.¹⁶⁵ When Public Lands Council appealed to the Supreme Court, the court “unanimously rejected [the appeal] and affirmed the Tenth Circuit.”¹⁶⁶ After nearly five years of litigation, almost all of the Rangeland Reform '94 regulations went fully into effect on May 15, 2000—just a few months before President Clinton left office. As will be discussed in greater detail in Section V(C) below, these regulations were eventually overturned during the George W. Bush Administration.

3. Environmental Organization Litigation Over BLM Grazing Rights

Since the failure of Rangeland Reform '94, environmental organizations like ONDA and WWP have attempted to meet the principles outlined in the FRH through litigation to remove livestock from portions of BLM land.¹⁶⁷ In *Oregon Natural Desert Association v. Bureau of Land Management*,¹⁶⁸ ONDA filed a

162. *Public Lands Council III*, *supra* note 113, at 744, 748, 750, 752; *see* Nicoll, *supra* note 44, at 76.

163. *See generally Public Lands Council I*, *supra* note 157, at 1451.

164. Taylor Grazing Act of 1934, 43 U.S.C. §§ 315-315(r) (2006).

165. *Public Lands Council v. Babbitt*, 167 F.3d 1287, 1289 (10th Cir. 1999) [hereinafter *Public Lands Council II*].

166. Nicoll, *supra*, note 44, at 787; *See Public Lands Council III*, *supra* note 113, at 750.

167. *See generally ONDA v. Rasmussen I*, *supra* note 101, at 1202; *see also* *Western Watersheds Project v. Bennett*, 392 F. Supp. 2d 1217, 1220 (D. Id. 2005).

168. *ONDA v. Rasmussen I*, *supra* note 101.

lawsuit against the BLM, the Secretary of the Interior, and several local BLM managers to stop a proposed riparian remediation construction project on BLM rangeland in Oregon.¹⁶⁹ In 1998, the BLM determined that the East-West Gulch in the Beaty Butte Allotment was “failing to meet federal rangeland health standards.”¹⁷⁰ The BLM concluded, however, that livestock grazing in the area did not significantly affect the declining rangeland health.¹⁷¹ The BLM subsequently developed an action plan that was designed to restore the East-West Gulch through the construction of a series of livestock improvements and road relocation from the riparian floodplain to a nearby ridge.¹⁷² ONDA objected to the construction and preferred that livestock grazing be reduced or ended as an alternative method for riparian restoration.¹⁷³ ONDA performed a wilderness inventory of the area pursuant to agency protocols, determined that multiple wilderness resources might be jeopardized by the construction projects, and submitted it to the BLM. When the BLM refused to alter or halt the action plan, ONDA filed suit. Important to this comment is ONDA’s contention that the BLM violated its National Environmental Policy Act (NEPA)¹⁷⁴ requirements when it “did not consider the full range of alternatives to its proposed action”¹⁷⁵ and when it “failed to consider new information on wilderness resources.”¹⁷⁶ The District Court held that the BLM was “obligated under NEPA to consider whether there were changes in, or additions to, the wilderness values within the East-West Gulch and whether the proposed action in that area might negatively impact those wilderness values.”¹⁷⁷ However, the District Court also ruled that the BLM had not acted in an arbitrary and capricious manner by not considering in greater detail the reduction of

169. *Id.* at 1205, 1207.

170. *Id.* at 1206.

171. *Id.*

172. *Id.* at 1207.

173. *Id.*

174. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4361 (2006).

175. *ONDA v. Rasmussen I*, *supra* note 101, at 1207.

176. *Id.*

177. *Id.* at 1213.

grazing in the East-West Gulch.¹⁷⁸ Once the District Court had ruled in its favor, however, ONDA was able to request and receive a judicial stay on any additional BLM construction in the East-West Gulch until such time as a proper environmental assessment and wilderness inventory had been performed.¹⁷⁹ This meant that in a new assessment and inventory, the BLM could potentially consider reduction in livestock grazing as an alternative method for riparian restoration that would preserve wilderness resources.

D. U.S. Forest Service Litigation

Unlike that on state or BLM rangeland, environmental organization grazing lease litigation with regard to Forest Service land is often unsuccessful.¹⁸⁰ Occasionally, however, environmental organizations do find some success when pursuing Endangered Species Act (ESA)¹⁸¹ claims. In *Forest Guardians v. U.S. Forest Service*,¹⁸² Forest Guardians brought suit against the Forest Service, alleging violations of the ESA for failure to adhere to a 1993 U.S. Fish and Wildlife Service (FWS) Recovery Plan for the threatened Mexican spotted owl¹⁸³ in parts of eleven national forests in Arizona and New Mexico.¹⁸⁴ In response to the FWS Recovery Plan, the Forest Service in 1996 “developed

178. *Id.* at 1214.

179. *Oregon Natural Desert Ass’n v. Rasmussen*, 2006 U.S. Dist. LEXIS 91648 (D. Or. Dec. 12, 2006) [hereinafter *ONDA v. Rasmussen II*].

180. *See generally* *League of Wilderness Defenders v. U.S. Forest Serv.*, 549 F.3d 1211 (D. Or. 2008) (holding that the Forest Service’s Final Environmental Impact Statement for allowing commercial logging adequately evaluated the cumulative effects of past and present grazing); *see generally* *Oregon Natural Desert Ass’n v. U.S. Forest Serv.*, 550 F.3d 778 (9th Cir. 2008) (holding that effluents from livestock were not a point source within the meaning of the Clean Water Act, and, therefore, no state certification was required for issuance of livestock grazing permit).

181. Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544 (2006).

182. *See* *Forest Guardians v. U.S. Forest Serv.*, No. CV 00-612-TUC-RCC, 2002 U.S. Dist. LEXIS 25440 (D. Ariz. Oct. 17, 2002).

183. *Id.* at *5.

184. Press Release, EarthJustice, Court Rules National Forest Grazing Illegal, Judge Rules National Forest Livestock Grazing Program in New Mexico and Arizona Threatens Mexican Spotted Owl, Violates ESA (Oct. 17, 2002), *available at* http://www.earthjustice.org/news/press/002/court_rules_national_forest_grazing_illegal.html.

amendments . . . to their Forest Plans for the eleven national forests in the Southwest Region.”¹⁸⁵ The amendments required that the Forest Service “monitor forage use by livestock and other animals in ‘key forage monitoring areas’ and to ensure that forage use does not exceed forage utilization standards during the growing season.”¹⁸⁶ The Forest Service intended to modify its management practices prior to the 1996 amendments, so it consulted with the FWS in order to determine whether the new practices would negatively affect the owl.¹⁸⁷ The FWS then issued two biological opinions whereby it determined that the 1996 amendments would comply with the ESA and that the pre-1996 practices would not.¹⁸⁸

The District Court held that the Forest Service subsequently did not implement the standards outlined in the 1996 amendments and was in violation of the ESA because it failed to alert the FWS that implementation would not proceed immediately.¹⁸⁹ Because the Forest Service was not in compliance with the ESA, the court subsequently ordered all livestock removed from the eleven national forests and ordered the Forest Service to “consult with the [FWS] to determine whether the federally protected owls need additional protections.”¹⁹⁰

As demonstrated above, environmental organizations have achieved some great successes in removing or limiting livestock on state owned, BLM, and Forest Service rangeland. Because of this success, grazing lease litigation has increased. As a result, the ranching industry, the public, and legislative bodies have developed an extremely negative perception of environmental organizations.

185. *Forest Guardians v. U.S. Forest Serv.*, 2002 U.S. Dist. LEXIS 25440, at *4 (D. Ariz, Oct. 16, 2002).

186. *Id.*

187. *Id.*

188. *Id.* at *5.

189. *Id.* at *21.

190. Press Release, Earthjustice, Court Orders Cows Off of Essential Mexican Spotted Owl Habitat, Southwest Cattle Grazing Harming Mexican Spotted Owls, (Nov. 26, 2002), *available at* http://www.earthjustice.org/news/press/002/court_orders_cows_off_of_essential_mexican_spotted_owl_habitat.html.

V. REACTION TO ENVIRONMENTAL ORGANIZATIONS' LITIGATION

While reduction of overgrazing is a laudable goal, the litigation employed by rangeland protection organizations to achieve it has created a publicity nightmare. Ranchers and other landowners have become increasingly hostile to the environmental organizations' interests and activities because they have been excluded from the public land they have used for generations, and the legislatures in several states have been pressured by ranching associations to help protect them from unwanted assault by environmental organizations.¹⁹¹ This pressure usually results in state legislatures passing either laws that make it financially more difficult for environmental organizations to outbid ranchers on grazing leases¹⁹² or constitutional amendments or laws that prevent environmental organizations' bids from being considered in the first place.¹⁹³ Finally, ranching associations have pressured federal agencies like the BLM to dismantle much of the regulatory reform that enabled environmental organizations' legal victories on federal rangeland.

A. Landowner Reaction

The ranchers who have lost grazing leases are understandably very upset by environmental organizations' success¹⁹⁴ because their families generally have grazed their livestock for generations on public rangeland grazing leases.¹⁹⁵ Ranchers have had to increase the size of their herds just to compete and earn a living.¹⁹⁶ Unfortunately, as described above, increasing

191. Fairfax & Issod, *supra* note 36, at 359, 365.

192. ARIZ. REV. STAT. ANN. § 37-284(B) (2002), *amended by* 2002 Ariz. Legis. Serv. ch. 204 (West).

193. IDAHO CODE ANN. § 58-310B(2)(a) (2008), *invalidated by IWP II*, *supra* note 106.

194. *See* ARIZ. CATTLEMEN'S ASS'N, BIDDING WARS, *supra* note 16.

195. *Id.*

196. *See generally* Tim Heardan, *Ranchers May Face Tough Times*, CAPITAL PRESS, Jan. 8, 2009, *available at* http://www.klamathbucketbrigade.org/Capital_Press_Ranchersmayfacetoughtimes010909.htm.

herd size leads to overgrazing and rangeland degradation.¹⁹⁷ Often, the court-ordered removal of livestock from a grazing lease will jeopardize ranchers' entire livelihoods.¹⁹⁸ Once a court grants an environmental organization a legal victory as in *Guardians v. Wells*¹⁹⁹ in Arizona, it sets a legal precedent that could cause more ranchers to lose their leases.²⁰⁰

B. Legislative Reaction

In Arizona, the SLD has sided with ranchers throughout its existence,²⁰¹ and although the Arizona Supreme Court has since held that environmental organizations like WildEarth Guardians may bid on grazing leases, the decision has not radically changed the policies or preferences of the SLD.²⁰² The court's holding definitely did not change the "political environment in which the agency operates," and the Arizona Legislature is "even more adverse to change than [the SLD]."²⁰³ In 2002, the legislature amended several sections of the Arizona Revised Statutes in response to *Guardians v. Wells*²⁰⁴ so that successful bidders have to pay for improvements installed by previous lessees.²⁰⁵ For environmental organizations like WildEarth Guardians, this legislation presents a problem with bidding on grazing leases because the improvements can be prohibitively expensive and

197. See generally Oregon Natural Desert Association, Public Lands Grazing, *supra* note 11; see generally General Concepts Related to Overgrazing, <http://people.oregonstate.edu/~muirp/genconce.htm> (last visited Oct. 26, 2009); see generally NAT'L RES. DEFENSE COUNCIL & EARTHJUSTICE, *supra* note 102, at 1; see generally NAT'L RES. CONSERVATION SERV., RANGELAND SOIL QUALITY—WIND EROSION, *supra* note 105, at 1.

198. See Scotta Callister, *Ranchers Seek Smith's Help in Grazing Battle*, BLUE MOUNTAIN EAGLE, Aug. 20, 2008, at 1-2.

199. *Guardians v. Wells*, 34 P.3d 364 (Ariz. 2001).

200. See ARIZ. CATTLEMEN'S ASS'N, BIDDING WARS, *supra* note 16, at 2.

201. Fairfax & Issod, *supra* note 36, at 359.

202. *Id.*

203. *Id.*

204. An Act Amending Sections 37-284, 37-322.01 and 37-322.03, 2002 Ariz. Legis. Serv. Ch. 204 (S.B. 1274) (West); Fairfax & Issod, *supra* note 36, at 359; *Guardians*, 34 P.3d at 364.

205. ARIZ. REV. STAT. ANN. § 37-284(C) (2002), amended by 2002 Ariz. Legis. Serv. ch. 204 (West).

make it impossible to obtain the lease.²⁰⁶ If an environmental organization is not able to pay for the cost of non-removable improvements installed by the previous lessee, then the lease is awarded to the next best bidder, which would be the other party contesting the lease—the current lessee.²⁰⁷

As mentioned above, the Idaho Legislature amended the Idaho Code to prevent organizations like IWP from obtaining grazing leases in order to let the land “rest.”²⁰⁸ After the Idaho SBLC used this provision to reject IWP’s grazing lease high bid for the second time, IWP was forced to file another lawsuit to acquire the lease.²⁰⁹ The Idaho Legislature adopted a resolution in 1998 that proposed to amend the section of the Idaho Constitution that allowed IWP to prevail in 1996. The amendment changed the word “disposal” in the section to “sale” in reference to the disposition of trust lands in Section 8.²¹⁰ This changed the whole meaning of the sentence upon which the Idaho Supreme Court relied in its 1996 decision—the new language would prevent the legislature from stipulating that the school-trust land could be leased in such a way so that it could provide a benefit to the schools.²¹¹ Once restricted to sales alone, IWP and other like-minded environmental organizations would no longer be able to apply for and be awarded grazing leases under Section 8 of the state constitution.²¹² Idaho voters approved this amendment in the general election of November 3, 1998.²¹³ However, the court overturned the amendment because of a procedural technicality,²¹⁴ and the legislature has not yet acted to readopt it.

206. See generally ARIZ. REV. STAT. ANN. §§ 37-284(C), 37-322, 37-322.01, 37-322.02, 37-322.03 (2008).

207. See ARIZ. CATTLEMEN’S ASS’N, BIDDING WARS, *supra* note 16, at 2.

208. IDAHO CODE ANN. § 58-310B(2)(a) (2008), *invalidated by IWP II*, *supra* note 106.

209. *Id.* at 370-71.

210. IDAHO CONST. art. IX, § 8 (amended 1998), *invalidated by Idaho Watersheds Project v. State Bd. Land Comm’rs*, 982 P.2d 358 (Idaho 1999) [hereinafter *IWP III*].

211. *IWP I*, *supra* note 14, at 1209.

212. See generally *IWP III*, *supra* note 210.

213. *Id.* at 360.

214. IDAHO CONST. art. XX, § 2 (providing that “[i]f two (2) or more amendments are proposed, they shall be submitted in such manner that the electors shall vote for or against each of them separately”).

C. Agency Reaction to BLM Grazing Reform

The inauguration of George W. Bush on January 20, 2001 marked the end of Rangeland Reform '94. Even though *Public Lands Council v. Babbitt III*²¹⁵ had been decided only a few months before, President Bush campaigned on a platform “promising to limit the federal government’s intrusion into extraction activities.”²¹⁶ On January 30, 2003, BLM Director Kathleen Clarke promised to rewrite the BLM grazing regulations.²¹⁷ When the BLM promulgated its final regulations on July 12, 2006,²¹⁸ it undid almost all of the reform instituted in 1995.²¹⁹ In particular, the BLM modified the FRH guidelines so that they “no longer have any direct effect on the management of BLM rangeland.”²²⁰ In effect, grazing practices and regulations exist as they did prior to Babbitt’s efforts at reform.

VI. PROPOSED SOLUTIONS INVOLVING ALTERNATIVE DISPUTE RESOLUTION

Because grazing lease litigation by environmental organizations has created such negative reactions from landowners, legislatures, and federal agencies, the only effective way to solve the problem is to reduce the amount of litigation. One way to achieve this goal is through Alternative Dispute Resolution (ADR), whereby “a neutral third party participates to assist in the resolution of issues in controversy, through processes such as early neutral evaluation, mediation, mini-trial, and arbitration.”²²¹ When used to resolve environmental disputes, however, ADR has also been referred to as Environmental Conflict Resolution, or ECR.²²² Because environmental and ranching organizations have been especially litigious in

215. *Public Lands Council III*, *supra* note 113.

216. Nicoll, *supra* note 44, at 97.

217. *Id.* at 98.

218. See Administration of Livestock Grazing—Exclusive of Alaska, 71 Fed. Reg. 39,402 (July 12, 2006) (to be codified 43 C.F.R. pt. 4100).

219. Nicoll, *supra* note 44, at 99.

220. *Id.* at 105.

221. Alternative Dispute Resolution Act of 1998, 28 U.S.C. § 651(a) (2006).

222. Joseph A. Siegel, *Alternative Dispute Resolution in Environmental Enforcement Cases: A Call for Enhanced Assessment and Greater Use*, 24 PACE ENVTL. L. REV. 187, 189 (2007).

attempting to resolve grazing lease disputes²²³ and because the litigation itself takes years to reach completion,²²⁴ ADR is an efficient avenue for conflict resolution.²²⁵ ADR has worked to resolve major environmental disputes between a wide variety of stakeholders, and it can work with parties regarding grazing lease disputes as well.²²⁶ Therefore, state legislatures and Congress should enact laws that authorize and encourage grazing lease disputes to be funneled into ADR systems, and the BLM and Forest Service should renew their commitment to negotiated rulemaking so that ADR is again emphasized for agency rulemaking and adjudication.

A. Environmental Disputes Resolved Through ADR

ADR has been used successfully to resolve a number of environmental disputes, and it is often used when resolving land use conflicts.²²⁷ In these types of conflicts, multiple stakeholders, each with different concerns and objectives, are usually involved. Because of the sheer number of differing objectives among the parties, litigation can be both time-consuming and costly.²²⁸ However, by using ADR, stakeholders are generally able to reduce both litigation time and legal expense.²²⁹ For example, in a dispute over a proposed dam on the Snoqualmie River in Washington, “environmental advocates opposed the project because of their concern over the survival of the river’s ecosystem; farmers were concerned about proposed reductions in water for irrigation; and citizens worried about the potential for uncontrolled suburban sprawl.”²³⁰ Instead of litigation, the

223. See *Guardians v. Wells*, 34 P.3d 364 (Ariz. 2001); see also *IWP I*, *supra* note 14, at 1206; see *IWP II*, *supra* note 106, at 367; see also *Public Lands Council III*, *supra* note 113, at 728.

224. See, e.g., *IWP I*, *supra* note 14, at 1206; see also *IWP II*, *supra* note 106, at 367.

225. See Siegel, *supra* note 222, at 197.

226. See John R. Nolon & Jessica Bacher, *Zoning and Land Use Planning: The Role of Lawyers in Resolving Environmental Interest Disputes, Contexts for Resolving Environmental Interest Conflicts and Disputes*, 37 REAL EST. L. J. 73, 76 (2008).

227. *Id.* at 76, 77.

228. See Siegel, *supra* note 222, at 197.

229. *Id.*

230. See Nolon & Bacher, *supra* note 226, at 76.

parties agreed to mediation by two facilitators,²³¹ and “the parties implemented many of the land use recommendations that were agreed upon and formed a basin-wide coordinating council that continued operating for ten years.”²³² In Southern California, urban sprawl and development threatened to impair or eliminate the last of the “coastal sage scrub habitat, [which was] vital to the survival of a number of species endemic to the area.” Utilizing a voluntary Natural Communities Conservation Planning (NCCP) scheme, developers, landowners, and local officials successfully created a development plan that set aside “large core habitat reserves and wildlife corridors” and set “tough development limits” in buffer areas around protected habitat cores.²³³ While this land use dispute did not come to litigation, the parties recognized that “legal proceedings would likely be too rigid, time consuming, costly, and inadequate” to resolve the conflict.²³⁴ As these examples show, ADR can effectively and efficiently resolve environmental disputes, and, therefore, it should be used to resolve grazing lease disputes as well.

B. State and Federal Statutory Schemes

As explained above, most grazing lease litigation in state courts occurs because of disputes over the school-trust endowment land granted to states when they were admitted into the U.S. Because Congress has no police power, it cannot force the individual states to adopt and enforce statutes that require ADR in all grazing lease litigation.²³⁵ However, Congress could encourage states to enact such legislation through its spending power²³⁶ and could condition receipt of funds for a national project on such enactment.²³⁷ Furthermore, the fundamental

²³¹ *Id.*

²³² *Id.* at 76-77.

²³³ Bradley C. Karkkainen, *Getting to “Let’s Talk”: Legal and Natural Destabilizations and the Future of Regional Collaboration*, 8 NEV. L.J. 811, 816 (2008).

²³⁴ Carrie Menkel-Meadow, *Getting to “Let’s Talk”: Comments on Collaborative Environmental Dispute Resolution Processes*, 8 NEV. L.J. 835, 841 (2008).

²³⁵ See U.S. CONST. art. I, §§ 8, 9.

²³⁶ U.S. CONST. art. I, § 8, cl. 1.

²³⁷ See *South Dakota v. Dole*, 483 U.S. 203 (1987).

right to justice would be frustrated if states forced parties to grazing lease conflicts into ADR.²³⁸

However, a state statutory scheme promoting and encouraging parties to mediate grazing lease conflicts could be established. Under such a scheme, a state legislature would craft a bill authorizing ADR in its courts in a manner similar²³⁹ to the authorization in the Alternative Dispute Resolution Act of 1998 (ADR Act).²⁴⁰ The legislature could then draft the statute so that there were positive incentives for parties to utilize ADR processes like mediation, arbitration, and binding arbitration. The incentives could be: drastically reduced court fees and processing time, immediate access to a qualified official mediator or arbiter, or even a stipend, tax write-off, or other financial bonus directed to the parties in exchange for their use of an ADR solution instead of insisting on a trial. The same could be done with negative financial incentives to prevent parties from choosing trial over the ADR system, but these might be more difficult to enact and enforce than positive incentives. While some of these strategies—especially that of the negative financial incentive to participate in ADR—may be difficult to enact, the benefits of a less-cluttered case docket and less hostility between environmental organizations and ranching interests may outweigh any potential legislative difficulties.

A statutory scheme for the federal courts might not be as difficult to establish as it would be in the individual states. Congress already has an ADR Act,²⁴¹ so ADR has been authorized and encouraged in federal courts.²⁴² It would be a relatively simple matter to amend the ADR Act to include the same positive and negative incentives outlined above to encourage parties to grazing lease litigation to use the ADR system already in place. However, grazing lease litigation is generally only a problem in the western U.S., and Representatives and Senators from the rest of the country might be disinclined to vote for such an amendment. Political ideologies could also come into play just as they did in the legislative defeat

238. *See generally* Griffin v. Illinois, 351 U.S. 12 (1956).

239. Alternative Dispute Resolution Act of 1998, 28 U.S.C. § 651(a) (2006).

240. *Id.* §§ 651-58.

241. *Id.*

242. *Id.* § 651(a).

of Rangeland Reform '94. The best method for passage would involve compromise on both sides of the political spectrum. Proponents of the legislation might need to assure conservative members that it is intended to reduce court costs and clear the court dockets, not to deny ranchers' rights or abilities to graze on public rangeland, and proponents should also assure liberal members that the legislation would not remove or hamper environmental organizations' ability to stop ecological damage caused by overgrazing.

C. Renewed Agency Commitment to Negotiated Rulemaking

During the 1980's, federal agencies like the BLM and Forest Service embraced negotiated rulemaking, which is sometimes called "regulatory negotiation" or "reg-neg," as an "alternative to traditional procedures for drafting proposed regulations."²⁴³ Under negotiated rulemaking, "the agency, with the assistance of one or more neutral advisers known as 'convenors,' assembles a committee of representatives of all affected interests to negotiate a proposed rule . . . to reach consensus on a text that all parties can accept."²⁴⁴ Therefore, negotiated rulemaking is a method by which agencies can avoid much of the conflict between parties affected by the rule and the subsequent litigation they use to obtain relief.²⁴⁵ Unfortunately, even though negotiated rulemaking is supported and encouraged by the Negotiated Rulemaking Act of 1990,²⁴⁶ federal agencies have used it with much less frequency over the past decade because of declining budgets and agency reorganization during the George W. Bush Administration, among other factors.²⁴⁷ Generally, agencies no longer voluntarily use negotiated rulemaking.²⁴⁸ Because regulations governing grazing on BLM and Forest Service land have proven to be very contentious, reestablishing and increasing

243. Jeffrey S. Lubbers, *Achieving Policymaking Consensus: The (Unfortunate) Waning of Negotiated Rulemaking*, 49 S. TEX. L. REV. 987 (2008).

244. *Id.* at 988.

245. *Id.* at 991.

246. *Id.* at 989; Negotiated Rulemaking Act of 1990, 5 U.S.C. § 561-570 (2006).

247. *See* Lubbers, *supra* note 243, at 996-1005.

248. *Id.* at 1004.

negotiated rulemaking in these agencies could significantly reduce grazing lease litigation by bringing environmental organizations and ranching interests together to draft grazing regulations that protect both rangeland health and the ranching way of life.

VII. CONCLUSION

Grazing lease litigation is a pervasive problem in the western U.S., and environmental organizations have seen great success in wresting grazing leases away from ranchers. However, this has created a public relations nightmare and has provoked strong legislative and regulatory reactions against environmental organizations. Efforts to reform the public grazing system to promote rangeland health have failed, and no viable solution currently exists. Rangeland Reform '94 was too limited and watered-down to effectuate the change necessary to prevent the grazing lease cases from clogging western court dockets. A Rangeland Reform '10 legislative package of amendments to the ADR Act to implement the state and federal statutory schemes outlined in this comment combined with a renewed agency commitment to negotiated rulemaking could result in an end to grazing lease litigation, as we have known it.