

JACK K. STERNE -- OSB #95522  
P.O. Box 476  
Camp Sherman, OR 97730  
(541) 595-5545  
Attorney for Petitioners

UNITED STATES DEPARTMENT OF INTERIOR  
BEFORE THE SECRETARY OF THE DEPARTMENT OF INTERIOR

In Re Petition for Rulemaking )  
Pursuant to 43 C.F.R. § 14.1-4 and )  
5 U.S.C. § 553(e). )  
)  
OREGON NATURAL DESERT ASSOCIATION; )  
IDAHO WATERSHEDS PROJECT; )  
SOUTHWEST CENTER FOR BIOLOGICAL )  
DIVERSITY; OREGON TROUT; COMMITTEE )  
FOR IDAHO’S HIGH DESERT; FOREST )  
GUARDIANS; OREGON WILDLIFE )  
FEDERATION; HELLS CANYON )  
PRESERVATION COUNCIL; FRIENDS OF )  
NEVADA WILDERNESS; OREGON NATURAL )  
RESOURCES COUNCIL; NORTHWEST )  
ECOSYSTEM ALLIANCE; NATIVE FOREST )  
NETWORK; NORTHWEST ENVIRONMENTAL )  
ADVOCATES; AMERICAN LANDS )  
ALLIANCE; SISTERS FOREST PLANNING; )  
COMMITTEE; NATIVE FOREST COUNCIL; )  
SAVE THE WEST; IDAHO CONSERVATION )  
LEAGUE; THE LANDS COUNCIL; PORTLAND )  
AUDUBON SOCIETY and VOICE OF THE )  
ENVIRONMENT. )  
)  
Petitioners. )  
\_\_\_\_\_ )

PETITIONERS’ STATEMENT OF  
REASONS IN SUPPORT OF  
PETITION FOR RULEMAKING

**I. INTRODUCTION**

Petitioners Oregon Natural Desert Association, Idaho Watersheds Project, Southwest Center for Biological Diversity, Oregon Trout, Committee for Idaho’s High Desert, Forest Guardians, Oregon Wildlife Federation, Hells Canyon Preservation Council, Friends of Nevada Wilderness, Oregon Natural Resources Council, Northwest Ecosystem Alliance Native Forest Network, Northwest Environmental AdvocateS, American Lands Alliance, Sisters Forest Planning Committee, Native Forest Council, Save The West, Idaho Conservation League, The Lands Council, Portland Audubon Society and Voice Of The Environment (“Petitioners”) request

that the Department of Interior (DOI) initiate a rulemaking to establish procedural and substantive standards to govern the Bureau of Land Management's (BLM) determinations of those areas of BLM land that are "chiefly valuable for grazing and raising forage crops" as required by section 315 of the Taylor Grazing Act (TGA), 43 U.S.C. § 315 et seq. BLM is required by the TGA, the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. § 1701 et seq., and the National Environmental Policy Act (NEPA), 42 U.S.C. 4321 et seq., to make such a determination each time the agency prepares a land use plan under FLPMA.

Petitioners submit this request because BLM has continually failed to determine that the areas within grazing districts under the agency's jurisdiction are in fact "chiefly valuable for grazing." The lack of procedural and substantive standards to guide such determinations is a principle reason for this lack of action. The failure to comply with the TGA, FLPMA, and NEPA has resulted in drastic degradation and, in some cases, irreparable damage to resource values on public lands managed by the BLM. This ecological destruction violates one of the express purpose of the TGA: to protect federal lands from the harmful effects of overgrazing. This petition details the statutory basis for our request, the failure of the DOI to comply with its statutorily mandated duty, and the ecological devastation resulting from DOI's failure to appropriately classify public lands as grazing districts.

## **II. BACKGROUND OF THE TAYLOR GRAZING ACT**

In passing the TGA, Congress intended to stop the unregulated disposition and use of the public domain. See generally, E. Peffer, *The Closing of the Public Domain* (1951); Phillip Foss, *Politics and Grass* (1969). Prior to passage of the TGA, most of the prime agricultural and grazing lands held by the federal government in the western United States were claimed by settlers. Id. The remaining public lands were largely comprised of marginally productive areas that lacked either water or rich soils. Id. However, even those marginal areas were used for grazing and farming. Id. This overexploitation caused thousands of square miles of once-healthy grassland and riparian ecosystems to be plowed under or severely degraded. Id. The effects of this unregulated use of the public domain resulted in the ecological tragedy of the Great Dust Bowl. Id.

Congress acted to reverse this devastation and preserve the public lands through passage of the TGA. *Public Lands Council v. Babbitt*, No. 96-8083, \_\_\_ F.3d \_\_\_, n.5 (10th Cir. 1998) (recognizing that the TGA treats stabilizing the livestock industry as a secondary goal to preservation); *Carl v. Udall*, 309 F.2d 653, 657-58 (D.D.C. 1962) (recognizing that the TGA has a preservationist purpose) (citing Dept. of the Int., Nelson A. Gertula, substitute-attorney-in-fact for W.C. Howell, attorney-in-fact for Frank L. Huston, Spokane 018338, Appeal from the General Land Office (A. 23158; Dec. 31, 1941)); 54 IBLA 521, 524 (citing Statement of the President on Approval of the TGA, Explanation of the Law, and Executive Order 6910). To accomplish these goals, the TGA gave the Secretary of the Department of the Interior ("Secretary") the power to withdraw, classify, and regulate the use of vacant and unappropriated public lands within grazing districts. 43 U.S.C. § 315.

The preamble of the TGA states that the Act was passed "[t]o stop injury to the public grazing lands by preventing overgrazing and soil deterioration." 48 Stat. 1269, preamble, June 28, 1934 (emphasis added). The TGA sought to effectuate this purpose by requiring the

Secretary to determine the characteristics of a parcel of land, classify that land based on its characteristics, and then regulate the use of the land based on its classification. Because Congress was cognizant of the severe ecological damage that overgrazing had caused, the legislation requires the Secretary to determine that land is chiefly valuable for grazing prior to including such land within a grazing district.

### III. DOI HAS FAILED TO COMPLY WITH CONGRESS' MANDATE UNDER THE TAYLOR GRAZING ACT

#### A. The TGA Requires The Secretary To Classify Only Those Lands That Are Chiefly Valuable For Grazing As Grazing Districts

The TGA states:

In order to promote the highest use of the public lands pending its final disposal, the Secretary of the Interior is authorized, in his discretion, by order to establish grazing districts or additions thereto and/or to modify the boundaries thereof, of vacant, unappropriated, and unreserved lands ... which in his opinion are chiefly valuable for grazing and raising forage crops.

43 U.S.C. § 315 (emphasis added). Three sets of phrases and ideas stand out in support of the notion that the Secretary must be held to a high standard when making a finding that land can be classified as a grazing district: (1) the classification must “promote the highest use of the public lands”; (2) lands selected must be “chiefly valuable for grazing”; and (3) the decisions must be made through an “order” expressing an “opinion” that the lands are chiefly valuable for grazing. Those concepts are discussed below.

##### 1. Classifications must “promote the highest use of the public lands”

First, the TGA seeks to “promote the highest use of the public lands.” *Id.* This phrase demonstrates that Congress considered public lands to have multiple uses which varied in importance to the nation.

The legislative history of the TGA shows that both Congress and the Executive were aware that public lands provided valuable uses such as outdoor recreation, wildlife habitat, flood control, watershed protection, and erosion control, in addition to grazing. To Provide for the Orderly Use, Improvement and Development of the Public Range, Hearings on H.R. 2835 and H.R. 6462, Comm. on the Public Lands, 73rd Cong., 1st & 2nd Sess., at 6, 18, 24 (statements of Harold Ickes, Secretary of the Interior, recognizing the value of public lands for flood control, protection of watershed and water supplies, and for stopping erosion); at 8 (statement of Henry Wallace, Secretary of Agriculture, recognizing their value for outdoor recreation, wildlife habitat, and for controlling natural and man-made erosion). The views of the Secretaries reflect the intent of the bill since the Department of Interior and Agriculture cooperated in drafting the TGA. *Id.* at 14, 26.

Land managers were also keenly aware that public lands had numerous values which the TGA sought to ensure were either protected or appropriately utilized. Through an Executive

Order, President Franklin Roosevelt withdrew all of the vacant, unreserved, and unappropriated public land in Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, North Dakota, South Dakota, Oregon, Utah, and Wyoming from entry or settlement. Exec. Order 6910 (Nov. 26, 1934). The Order reserved these lands for classification pending the Secretary's determination of the "most useful purpose to which such land may be put in consideration of the provisions of (the TGA), and for (the) conservation and development of natural resources." *Id.* Therefore, to ensure the nation derives the maximum amount of usefulness out of areas containing such values, the TGA requires that the Secretary appropriately classify public lands. 43 U.S.C. § 315.

The phrase "pending its final disposal" and the tiered classification system described in the TGA demonstrate that Congress considered grazing districts to be a temporary, low level classification. The DOI has long recognized that the TGA relegates grazing to the lowest use classification on the public lands. In *Thomas Omachea and Michael P. Casey, A-30599*, Dept. of Interior, 73 I.D. 339; 1996 I.D. LEXIS 38 (Nov. 1, 1996), appellants argued that they had been deprived of valuable property rights because they were denied access to water resources owned or controlled by them on government-owned allotments. Appellants contended that since their water rights were granted to supply water to livestock, this gave them a right to graze stock on other allotments. 73 I.D. at 346-47. In response, the Department stated that the TGA "is not just a grazing statute. On the contrary, it is a statute providing for an inventory of public lands and for the disposal of the land in accordance with their highest use... [I]n the [TGA's] scheme of classification grazing is the lowest use." *Id.*

2. Lands classified as grazing districts must be "chiefly valuable for grazing and raising forage crops"

Second, the TGA demands that the Secretary classify only lands which are "chiefly valuable for grazing and raising forage crops" as grazing districts. 43 U.S.C. § 315. Congress' use of the phrase "chiefly valuable" emphasizes the importance of correctly classifying lands prior to placing them in grazing districts. Practically speaking, the Secretary can only determine which lands are chiefly valuable for grazing after a thorough examination of the land's characteristics and a clear determination that the land is best suited for grazing, as against all other uses. The TGA's legislative history supports the notion that the Secretary could classify lands as grazing districts only after exhaustively studying the attributes of an area. See *infra* section III.C.

Further, the language of the TGA demonstrates that Congress considered grazing districts as a low-level classification among the variety of uses for which the Secretary could classify land. The TGA allows the Secretary to place land within grazing districts only pending its final disposal. 43 U.S.C. 315. This clearly shows that Congress considered grazing districts to be temporary classifications. To reinforce this point, Congress provided the Secretary with a variety of other classifications that he could apply if he determined that the land is more valuable or better suited for any other use than grazing. See 43 U.S.C. §§ 315 (discussing the value of lands for hunting and fishing) and 315a (discussing the value of land to control flooding and erosion).

Similarly, the TGA requires that, once the Secretary classifies land as a grazing district, he "shall make provision for the protection, administration, regulation, and improvement of such grazing districts." 43 U.S.C. § 315a (emphasis added). The simple yet forceful words of the

TGA are instructive as to the Secretary's nondiscretionary duties. The Secretary can classify public lands as grazing districts only if they meet specific criteria. Once he has classified such land, the Secretary must take affirmative steps to protect lands from degradation and improve land which is already damaged.<sup>1</sup>

Finally, the TGA demands that the Secretary "do any and all things necessary" to accomplish the purposes of the Act and to preserve the land and its resources from destruction or unnecessary injury. 43 U.S.C. § 315a. This reflects Congress' intent that the Executive thoroughly study the characteristics and health of the public lands to ensure grazing was not damaging these lands. Congress also authorized the Secretary to continue studying erosive forces and flood control and to perform protective and rehabilitative work on public lands. 43 U.S.C. § 315. When read in concert with each other, sections 315 and 315a predicate the creation of grazing districts on the Secretary's determination that the land's chief value is for grazing. These sections also mandate strict regulation of grazing to ensure that the land's ecological characteristics are protected and improved.

3. The determination must be supported by a record

Third, the phrases "by order" and "in his opinion" give rise to the need to make an affirmative determination -- through an "order" expressing an "opinion" -- that the lands within grazing districts are chiefly valuable for grazing. 43 U.S.C. 315. It is well settled administrative law that any such determination must be supported by a sufficient administrative record. See, e.g. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971). In making such determinations, "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicles Mfrs. Assn. v. State Farm Mutual*, 463 U.S. 29, 43 (1983). As noted below, the Executive branch led Congress to believe that agency personnel would undertake exhaustive studies of public lands prior to classifying them as grazing districts. See *infra*, section III.C. However, in the case of grazing districts, there is practically no administrative record to support the designation of the districts, much less an examination of data and a satisfactory explanation for those designations. Some of the orders designating the districts fail even to make reference to the phrase "chiefly valuable." See, e.g., Ex. 1.

B. The Secretary Has A Continuing Duty To Assess The Values Of Public Lands

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<sup>1</sup> The full text of pertinent provision of the TGA states,

The Secretary of Interior shall make provision for the protection, administration, regulation, and improvement of such grazing districts as may be created under the authority under authority of section 315 of this title, and he shall make such rules and regulations and establish a service, enter into cooperative agreements, and do any and all things necessary to accomplish the purposes of this Act and to insure the objects of such grazing districts, namely, to regulate their occupancy and use, to preserve the land and its resources from destruction or unnecessary injury, to provide for the orderly use, improvement, and development of the range; and the [Secretary] is authorized to continue the study of erosion and flood control and to perform such work as may be necessary amply to protect and rehabilitate the areas subject to the provisions of this Act.

43 U.S.C. § 315a (emphasis added).

Under the TGA, the Secretary has the continuing duty to insure that his classifications promote the “highest use” of the public lands. The TGA states that “[i]n order to promote the highest use of public lands pending its final disposal, [the Secretary may] establish grazing districts or additions thereto and/or modify the boundaries thereof ... which in his opinion are chiefly valuable for grazing and forage crops.” *Id.* at § 315 (emphasis added). The TGA goes on to authorize the Secretary “to examine and classify lands withdrawn or reserved ... or within a grazing district, which are more valuable and suitable for the production of agricultural crops than for [grazing], or more valuable or suitable for any other purpose.” 43 U.S.C. § 315f (emphasis added). Therefore, consistent with promoting the highest use of public lands, the Secretary must, at a minimum, periodically assess the values of all public lands to ensure their classifications are providing the maximum amount of benefit from those lands. Further, if the Secretary finds that grazing district lands are more suitable for any other purpose, then he must reclassify such lands using the power of reclassification given to him by Congress. *Id.*

It is well settled that the Secretary has a continuing duty to manage, protect, and preserve grazing district land and resources and to prevent their destruction or unnecessary injury. *Smith v. BLM*, IBLA-79-153, 48 IBLA 385, 389; 1985 IBLA LEXIS 142 (July 11, 1980) (recognizing the Secretary has a continuing responsibility for the protection and management of grazing districts); *Lewis v. Hickel*, 427 F.2d 673, 673-74 (9th Cir. 1970) (recognizing Secretary’s power to preserve and protect the land and resources within grazing districts, from destruction or unnecessary injury); see also *Public Lands Council v. Babbitt*, \_\_\_ F.3d at \_\_\_, n.5 (using the active voice when describing the Secretary’s duty under the TGA as “safeguarding rangeland” and “improvement of range conditions”). When the land or its resources are injured, the Secretary has a duty to revise or vacate his management decisions which are contributing to the problem. See *Smith v. BLM*, IBLA-79-153, 48 IBLA at 389; 1985 IBLA LEXIS at 142 (stating that when an AMP no longer meets objectives for good range management, there is a rational basis for change, and the BLM has a obligation to revise or vacate the AMP).

Additionally, the Secretary has a duty to ensure that his classifications inure the greatest benefit to the most people and to deny classifications which benefit individuals while harming the public. See *Carl v. Udall*, 309 F.2d at 657-58 (stating the Secretary has a duty to deny a requested classification where it would injure the interests of people as a whole and be inconsistent with the purposes for which the land was reserved) (citing *Dept. of the Interior, Nelson A. Gertula, substitute-attorney-in-fact for W.E. Howell, attorney-in-fact for Frank L. Huston, Spokane 018338, Appeal from the General Land Office (A. 231588; Dec. 31, 1941)*). This duty is based in the conservationist purposes of the TGA. *Id.* The duty to deny unwise uses “is essential to the national policy of conservation of the rapidly diminishing public domain and natural resources” which is embodied in the classification scheme of the TGA. *Id.*

Therefore, when creating or administering grazing districts, the Secretary has a duty to use all available information to ensure that the conservationist purpose of the TGA is realized through the classification scheme. *Id.* (Secretary has a duty to deny a requested classification where Secretary finds it would injure the interests of people as a whole and be inconsistent with the purposes for which the land was reserved). This includes ensuring that grazing district land is chiefly valuable for grazing or forage crops, that classifications inure the greatest amount of benefits to the nation, and that grazing does not injure the land. *Id.*; *Smith v. BLM*, IBLA-79-153, 48 IBLA 385 at 389; 1985 IBLA LEXIS at 142; and *Lewis v. Hickel*, 427 F.2d at 673-74.

Thus, whenever the Secretary finds a classification is injurious to public lands or allows uses that simply provide less of a benefit to the nation, the TGA requires him to reclassify the land or vacate the classification to remedy the problem.

C. The DOI Has Violated The TGA By Failing To Ascertain The Chief Value Of Public Lands Prior To Classifying Them As Grazing Districts

The language of the TGA, along with its legislative history, reveals the process that Congress intended the Secretary to use to ensure that lands were correctly classified. The TGA mandates that prior to the creation of any district, the Secretary must provide notice of the withdrawal, and then hold a hearing, at a location where state officials, settlers, residents, and live-stock owner could conveniently attend. 43 U.S.C. § 315. Grazing districts could then be established either 90 days following the sending of notices or 20 days after the hearing. *Id.*

The legislative history of the TGA demonstrates that the DOI assured Congress that the agency was committed to thoroughly studying the condition of the land, by conducting surveys and meetings, prior to creating grazing districts. To Provide for the Orderly Use, Improvement and Development of the Public Range, Hearings on H.R. 2835 and H.R. 6462, Comm. on the Public Lands, 73rd Cong., 1st & 2nd Sess., at 8. In response to a question regarding how the DOI would create grazing districts, Secretary Ickes answered, “That would be a practical question to be taken under consideration at the proper time. We would make a thorough study of the situation, and would certainly try to conform our policy to the best interests of the States where there is public land.” *Id.* This study was to include classification of the land, similar to the process in the Stockraising Homestead law, by the United States Geological Survey. *Id.* at 38-39. Other representatives from the Executive branch also stated that prior to designation as grazing districts, public lands would be examined and that overgrazed areas would not be placed into districts. *Id.* at 24.

Following the passage of the Act, Secretary of Interior Harold Ickes requested the Solicitor General draft an opinion addressing the question of whether the President could withdraw all of the remaining unreserved public lands from entry or settlement after passage of the TGA. 55 Dec. of the Dept. of the Int. 71 (Nov. 22, 1934). The Solicitor’s opinion described a process of selecting public lands that mirror’s the position taken by the Secretary when he was before Congress. The opinion stated, “the Secretary [ ] will be unable to administer the Taylor Act without a classification of the lands coming within its purview, based on physical character, proper use, size, location, etc.” *Id.* at 72. The Solicitor went on to observe that “it would be clearly impossible to determine, in the absence of careful examination and detailed classification, which 80 million acres of the remaining unappropriated and unreserved public lands are chiefly valuable for grazing and raising forage crops.” *Id.* (emphasis added).

However, the DOI did not fulfill its promise to “thoroughly study the condition of lands” prior to creating grazing districts, and therefore failed to take into account the ecological conditions or values present on public lands. This fact is evidenced by DOI’s rapid implementation of the TGA and its decision to allow grazing interests to dictate every aspect of the Act’s implementation, from the initial classification decisions to the content of regulations governing the use of those districts. Foss, *Politics and Grass* 117-20 (citing Farrington R. Carpenter, Director of the Division of Grazing, *The Law of the Range*, an address delivered at the

43rd annual meeting of the Colorado State Bar Assoc., held at Colorado Springs, Colorado, Sept. 1940). The DOI created the Grazing Division (“Division”) to oversee the implementation of the TGA. *Id.* The Division held meetings in which the TGA was explained to local persons. On February 9, 1935, there was one general meeting in Denver, Colorado. *Id.* Four months later, the Division created 33 districts which covered millions of acres of public land. *Id.*

A federal representative who presided over the first meeting held pursuant to the TGA described the haphazard process he used to determine the boundaries of a grazing district. PLLRC Revisited – A Potpourri of Memories, 54 Den. L.J. 445, 446-47 (1977). “So, when I came here, I said I’m supposed to set up grazing districts. I don’t know whether (local people) want them or not and I wouldn’t know where they go and Washington doesn’t know where they would go and nobody knows where they would go.” *Id.* at 447. To compound problems, the representative discovered that the local land office did not have a map of the surrounding area. *Id.* Since the federal representative had no understanding of local range conditions or grazing needs, he relied on stockmen elected by their peers to establish the district. *Id.*

Practically speaking, these locally elected boards performed all of the work in implementing the Act on a local level while federal officials acted only to coordinate actions. Foss, Politics and Grass 118 (citing Carpenter); see *Public Lands Council v. Babbitt*, \_\_\_ F.3d at \_\_\_ n.7 (noting that local stockmen dominated implementation of the TGA’s regulations in the early years of implementing the Act). Essentially no studies were performed by the Department to determine whether land was chiefly valuable for grazing. *Id.* Thus, the decisions about which land was “chiefly valuable” for livestock grazing were not made by DOI, but rather by the livestock industry, the very industry that the TGA was passed to regulate and whose abusive practices led to the need for the Act in the first place.

A 20-year old internal BLM memorandum recognizes that DOI failed to make even a reasoned decision on the value of public lands during the TGA’s classification process. Instructional Memo. No. 78-509 (Sept. 14, 1978). This memorandum, which assessed BLM’s policy for determining rangeland suitability for livestock grazing, includes a discussion of the developmental history of BLM’s suitability policy and criteria. *Id.* at 1-2. (citing Instructional Memoranda No. 78-134 (March 17, 1987)). The memorandum states:

The Bureau has considered rangeland suitability for livestock grazing for many years. In the old range survey methods, utilization deductions were made from steep slopes, rocks or stones, down timber, lack of water, unstable soils, erosion, lack of sufficient forage production, rodents, insects, and other limiting factors. This was a mixture of suitability and unsuitability. The deductions were arbitrary and more or less judgmental with no defined standards to substantiate the adjustments. The utilization deductions were not uniformly applied during range surveys of the public lands.

*Id.* at 2 (emphasis added). In light of the above agency document, the rapidity with which grazing districts were classified, the districts’ size and diversity of ecological conditions, and the role played by the livestock industry, there is little evidence to support the original grazing district classifications. Despite that fact, and the duty under the TGA to revisit classifications in light of changing circumstances, 43 U.S.C. § 315f, those classifications persist to this day.

The foundation of grazing administration under the TGA is its classification scheme. However, because DOI failed to undertake the exhaustive study of public lands necessary to make classification decisions, the original classification of grazing districts failed to protect those lands from overgrazing, or determine which lands had values that did not make them “chiefly valuable” for grazing. DOI’s classification techniques were substantively and procedurally arbitrary because they were based on personal judgments and not uniformly applied. Because all other grazing decisions are predicated upon this biased and arbitrary initial classification, the public lands have continued to be dominated by the lowest use recognized under the TGA. Furthermore, the classification of land as “grazing districts” has led to a presumption that such lands are, in fact, “chiefly valuable” for livestock grazing. As a result, numerous other highly important values that are present on public lands have continued to be degraded or destroyed by grazing.

#### IV. DOI HAS FAILED TO COMPLY WITH CONGRESS’ MANDATE UNDER THE FEDERAL LAND POLICY AND MANAGEMENT ACT

##### A. The Public Land Law Review Commission Recognized The Inadequacies Of The DOI’s Prior Classifications And Recommended Reforms

In 1964, Congress mandated a thorough review of the efficacy of public land laws and management. 78 Stat. 982, Pub. L. 88-606, §§ 1-4 (1964). Congress wanted this review to ensure that the public derived the maximum benefit from the retention and management of public lands. *Id.* To accomplish this goal, Congress created the Public Land Law Review Commission (“Commission”) to undertake a comprehensive review of public land laws and publish a report recommending revisions in such laws. *Id.*

In 1979, the Commission published a report titled, “One Third of the Nation’s Land,” that made several hundred recommendations for improving the government’s management of the public lands. Public Land Law Review Commission, *One Third of the Nation’s Land, A Rept. to the Pres. and to the Cong. by the Public Land Law Rev. Comm’n (1970) (“Report”).* The recommendations from the Report provided the basis for the Federal Land Policy and Management Act of 1976 (FLPMA). Committee on Energy and Natural Resources, 95th Cong., 2nd Sess., *Legislative History of the Federal Land Policy and Management Act of 1976*, 35 (Comm. Print 1978) (“Print”). A central concern of the Report was the extent to which the goals of numerous old public land laws had been subordinate to “broad Secretarial discretion to nullify them on a case by case basis, in response to individual applications.” *Id.* at 36.

To rectify this problem, the Report recommended a system under which the Secretary would be given a broad planning charter with directions to identify specific factors that must be considered when making management decisions on public lands. Report, at 41-42, 45, 49. These decisions were to be guided by land use plans. *Id.* The Report summed up this view by stating, “the essence of land use planning is found in the classification or zoning of lands for particular uses.” Report, at 52. The Report went on to state, “As an essential first step to the planning system we recommend, Congress should provide for a careful review of (1) all Executive withdrawals and reservations, and (2) BLM retention and disposal classifications under the Classification and Multiple Use Act of 1964.” *Id.*

The Commission concluded this review was needed because it found that executive agencies lacked data and records substantiating the purposes for the withdrawal and classification of land. *Id.* The Commission specifically noted this deficiency in regards to grazing districts. The Report stated:

There is no good information available to define and identify that portion of the 273 million acres under grazing permit that are chiefly valuable for domestic livestock. Some of the grazing land has important watershed values. Wildlife and outdoor recreation are also important uses on parts of the public grazing land.

Report, at 115 (emphasis added).

A study conducted in preparation for the Report noted that, “federal land managing agencies are unable to provide statistics showing the acreage of land ‘chiefly valuable for grazing,’ i.e. land characterized by perennial grassland with few or no trees, suitable only for grazing domestic livestock.” Staff of the Land Law Rev. Comm’n, Pub. Land Recs. and Inventory Info.: Their Compilation, Maintenance and Use, at 96 (1970) (emphasis added). The Report recommended “a complete review of all existing withdrawals [ ] to provide a basis for eliminating those that no longer serve a useful purpose, and for modifying those that are unnecessarily large.” Report, at 115 (emphasis added).

The Report recommended that public lands should be reviewed and thereafter, “those chiefly valuable for grazing of domestic livestock [should be] identified.” *Id.* The Report stated that:

[c]lassification of lands chiefly valuable for grazing use does not mean that other uses would be eliminated. It would, however, give the land managers a more precise basis upon which to allocate the land resources among competing uses. If the accommodation of competing use requires reduction in grazing, the manager would have a more meaningful standard for determining the necessary adjustment. Furthermore, the classification would give the livestock industry assurance that the land would not be shifted to another use, at least until such time as there is a clear, technically supportable determination that lands are no longer chiefly valuable for grazing.

*Id.* at 116. The Report also recommended that agencies identify and classify “frail and deteriorated lands” in which grazing “should be prohibited to the fullest extent practicable.” *Id.*  
\\\\\\par \\\\\\par \\\\\\par \\\\\\par B. Congress Incorporated The Report’s Recommendations Into The FLPMA

In 1976, Congress passed the Federal Land Policy and Management Act, 43 U.S.C. 1701 et seq., and declared that the national interest is best served when public lands and their resources are “periodically and systematically inventoried and their present and future use is projected through a land use planning process.” 43 U.S.C. § 1701. Pursuant to this declaration, Congress created a two-tiered process to guide the BLM’s classification and management of public lands.

In passing FLPMA, Congress also reinforced and heightened the TGA’s requirements

concerning public land classifications and protection of ecological values. As a first step in developing land and resource management plans (“LRMPs”), FLPMA requires the Secretary to undertake an exhaustive inventorying of all public land values and prior classifications. 43 U.S.C. § 1701. While this inventory does not solely determine the management or use of public lands, it should be used by the BLM to plan for the long-term management and use of public lands. 43 U.S.C. §§ 1701, 1711, 1712. The next step involves the creation of an LRMP. These LRMPs define appropriate management techniques and uses for specific areas of public lands. *Id.*

#### C. The FLPMA Requires Classification Decisions To Incorporate Multiple Use Principles

When developing LRMPs, FLPMA requires the Secretary to manage the public lands according to the principles of “multiple use and sustained yield.” 43 U.S.C. § 1712. These principles demand that the Secretary create LRMPs and manage the public lands and their resource values:

so that they are utilized in the combination that will best meet the present and future needs of the American people; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustment in use to conform to changing needs and conditions; the use of some land for less than all of the resources; a combination of balanced and diverse resource uses that takes into account the long-term needs of future generations for renewable and nonrenewable resources...; and the harmonious and coordinated management of various resources without permanent impairment of the productivity of the land and the quality of the environment with consideration being given to the relative values of the resources and not necessarily to the combination of uses that will give the greatest economic return of the greatest unity output.

43 U.S.C. § 1712. Additionally, these plans must “consider the relative scarcity of the values involved and the availability of alternative means [ ] and sites for realization of those values.” *Id.*

Therefore, the FLPMA modified the Secretary’s discretionary power to determine that grazing district lands are chiefly valuable for grazing by requiring that his determination occur using multiple use principles. 43 U.S.C. § 1701(a)(3); *National Wildlife Fed’n v. Buford*, 835 F.2d 305, 308-09 (9th Cir. 1987) (finding that classifications must be reviewed consistent with the principles of multiple use and sustained yield). Under this multiple use mandate, the Secretary must protect environmental and other values even if protection will sacrifice the greatest return or the greatest livestock unit output. *Natural Resources Defense Council v. Hodel*, 618 F.Supp. 848, 872 (E.D. Ca. 1985) (citing definition of multiple use contained at 43 U.S.C. § 1702(c)). This means the Secretary must reduce grazing where the ecology of an area is too sensitive to withstand grazing. *Hodel*, 618 F.Supp. at 872. Likewise, the Secretary must revoke the classification of land as a grazing district if he finds the area has more value for any other purpose than grazing. 43 U.S.C. § 315.

#### D. Classification Within The Context of Land Use Planning

The objective of the BLM’s regulations that implement the FLPMA’s planning process is to “maximize resource values for the public through a rational, consistently applied set of

regulations and procedures which promote the concept of multiple use.” 43 C.F.R. § 1601.0-2. The regulations describe a process in which the BLM identifies issues to be addressed in the LRMP, collects all relevant data and information on the land it administers, develops management objectives for these lands, and then monitors and evaluates the impacts of the LRMP to determine its effectiveness in meeting the management objectives.

When the BLM determines the issues it will address in an LRMP, the regulations require the BLM to review “available district records of resource conditions, trends, needs and problems.” 43 C.F.R. § 1610.4-1. During this process the BLM “shall arrange for resource, environmental, social, economic and institutional data and information to be collected, or assembled if already available. New information and inventory data collection will emphasize significant issues and decisions with the greatest potential impact.” 43 C.F.R. § 1610.4-3 (emphasis added). These inventories are supplemental to the resource inventories conducted by the BLM in other programs. 48 FR 20364-01, 20366 (May 5, 1983). The BLM must also “analyze the (collected data and information) to determine the ability of the resource area to respond to identified issues and opportunities.” 43 C.F.R. § 1610.4-4.

Therefore, the regulations require BLM to collect and analyze new and old information on land resources and values with an emphasis on information pertaining to issues and decisions with the greatest potential impacts. This means that if there is a potential that grazing districts boundaries were drawn in an arbitrary or scientifically indefensible fashion, then the BLM must collect new information to aid the agency in reclassifying those boundaries. For example, where there is the potential that lands, such as riparian areas, are not chiefly valuable for grazing, the BLM must collect new information to determine whether or not such areas can be included within grazing districts.

\\par E. The BLM’s Has Failed To Fulfill FLPMA’s Mandate By Neglecting To Promulgate And Use Regulations For Classifying And Inventorying Public Lands

A recent BLM information bulletin discussed the agency’s failure to promulgate regulations governing land classifications decisions after the passage of FLPMA. Bureau of Land Management, Department of Interior, Taylor Grazing Act Land Classification Issues, Informational Bull. No. 97-21 (Nov. 14, 1996). This bulletin noted that when FLPMA’s land use planning regulations were promulgated, “evidently no consideration was given to reconciling the planning regulations with BLM’s pre-FLMPA classification responsibility, notwithstanding the expiration or repeal before 1983 of the Classification and Multiple Use Act of 1964 and several other earlier classification authorities.” Id. at 4 (emphasis added). The bulletin stated, “Procedures for the classification of lands for recreation and public purposes, agricultural entries, and state selection currently are followed under 43 C.F.R. 2400, but rightly or wrongly, since the advent of mandatory land use planning, separate classification or suitability determinations for disposals for exchanges or sale often are not specifically identified in the relevant decisions or records.” Similarly, there are no BLM regulations for the classification of grazing districts.

F. The National Environmental Policy Act Strengthens The Requirements Of The TGA And FLPMA

When the BLM prepares an LRMP, the agency must also produce an Environmental Impact Statement (“EIS”) pursuant to the National Environmental Policy Act, 42 U.S.C. 4321 et

seq. (NEPA); 43 C.F.R. § 1601.0-6. The policy of NEPA is to ensure that an agency has all of the relevant information about the environmental impacts of a federal action prior to undertaking the action. *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 371-72 (1989); *Friends of Endangered Species v. Jantzen*, 760 F.2d 976, 985 (9th Cir. 1985). NEPA imposes a duty on federal agencies to gather information and do independent research when missing information is important, significant, or essential to a reasoned choice among alternatives. *Save Our Ecosystem v. Clark*, 747 F.2d 1240, 1244 n.5, 1248 (9th Cir. 1984). To effectuate NEPA's iterative decision-making process, all relevant information must be made available to the public to ensure that it plays a part in deciding which action an agency will implement. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

NEPA requires that an EIS state how it, and all the decisions based on the document, will or will not achieve the requirements of all environmental laws and policies. 40 C.F.R. §§ 1502.2 (d), 1508.27(b)(10). An EIS must also be supported by evidence that the agency has made the necessary environmental analysis when making these types of determinations. 40 C.F.R. § 1502.1. In an EIS, the BLM must "succinctly describe the environment of the area to be affected or created" by the alternatives. 40 C.F.R. § 1502.15. Therefore, NEPA demands that the BLM provide "data and analysis" to support the agency's finding that the land is chiefly valuable for grazing and raising forage crops. See 43 U.S.C. § 1701(a)(3) (requiring review of classifications); 40 C.F.R. § 1502.15 (requiring description of affected environment to contain data and analysis). However, the BLM has neither undertaken a review of grazing district classifications nor substantiated these classifications with data or analysis. Therefore, the Secretary's decision to continue classifying public lands as grazing districts is contrary to the requirements of all three statutes.

## G. Summary

In 1976, Congress was acutely aware of the DOI's failure to document its rationale for classifying public lands as grazing districts. In passing FLPMA, Congress required DOI to promulgate regulations to govern the agency's review of the appropriateness of grazing district classifications. This review had to occur pursuant to multiple use principles that supplemented the original statutory criteria for applying such classifications. NEPA added to DOI's procedural requirements when reviewing classifications because the agency must use all existing information and collect new information on the ecological values of an area before it can be classified as a grazing district. Additionally, the DOI must produce formal findings demonstrating that its classification decisions are consistent with all applicable environmental laws. The DOI has simply failed to fulfill these duties.

## V. The Secretary's Classification Decisions Have Severely Degraded Public Lands

BLM's management of riparian areas within grazing districts presents the most egregious examples of the effects of non-compliance with the above-mentioned statutes. Riparian areas account for the vast majority of the biological, watershed, and grazing values on most grazing districts. However, these areas have been severely degraded by grazing, to such an extent that some areas may never recover their lost values. The Secretary could have avoided much of this past devastation, and all current degradation, to rangeland values by classifying lands according to his statutory mandate under the TGA.

Western rangelands comprise the vast majority of lands under BLM's jurisdiction. The BLM is responsible for managing 176 million acres of uplands and 1 million acres of riparian areas. Bureau of Land Management, Dept. of Interior and Forest Service, Dept. of Agric., Rangeland Reform '94, Final Environmental Impact Statement 25 (1994) ("FEIS"). Of all the rangelands managed by the BLM, riparian zones amount to just one percent of the total area. *Id.* at 25.

The Environmental Protection Agency ("EPA") has recognized that these areas provide the overwhelming majority of values in western rangelands, including vital watershed functions that decrease flooding and increase year-round water availability, as well as providing 80% or more of the habitat for many species of wildlife. United States Environmental Protection Agency, Monitoring Primer for Rangeland Watersheds, 908-R-94-001, at 23 (1994). The BLM, the U.S. Fish and Wildlife Service ("FWS"), and the National Marine Fisheries Service ("NMFS") also have recognized that riparian areas provide greater watershed values and are more biologically productive and diverse habitat than uplands. FEIS, 25-26, and Appendix T: Biological Opinion FWS and NMFS.

The BLM has also acknowledged that it has mismanaged riparian areas by allowing overgrazing. Bureau of Land Management, Dept. of Interior and Forest Service, Dept. of Agric., Rangeland Reform '94, Draft Environmental Impact Statement, at 25, 3-33 (1994) (stating that the amount and quantity of riparian areas have been severely reduced since the 1930s, recognizing that grazing in these areas destroys their value) ("Draft"). In 1993, the BLM found that only 15% of BLM riparian areas were functioning properly, while 21% were at risk from further grazing, 9% were nonfunctioning, and 55% were in an unknown condition. Draft, at 3-33.<sup>2</sup> While factors such as flood control and irrigation impoundments have adversely impacted these areas, "they have been most effected [sic] by livestock grazing." *Id.* The FWS and NMFS agree with this assessment. FEIS, at 180-81. Specifically, the Biological Opinion for Rangeland Reform '94 concluded that "extensive riparian areas have been so degraded that they are no longer recognizable as having riparian or wetland values."<sup>3</sup> *Id.* (emphasis added).

The Draft EIS on rangeland reform states that riparian areas on BLM lands during the late 1980s were in the worst condition in history. Draft, at 3-32. The BLM derived this fact from an EPA document produced in 1990, titled, "Livestock Grazing On Western Riparian Areas." FEIS, at 94 (the FEIS recognized that this statement was generally applicable to riparian areas throughout the west). This EPA document details the devastation that grazing visits upon healthy and degraded riparian areas. EPA, Livestock Grazing On Western Riparian Areas 5-6 (4th ed.

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<sup>2</sup> Compare Draft at 26 (using Forest service methods for determining functionality of land, BLM estimates that of its riparian areas, 20% are not functioning properly, 46% are at risk but threatened by livestock grazing, and 34% are properly functioning).

<sup>3</sup> It is important to note that the continuation of practices that have resulted in permanent degradation of resources values would violate FLPMA multiple use management principles because multiple use management may not result in "permanent impairment of the productivity of the land." 43 U.S.C. §§ 1702(c), 1712.

1993).<sup>4</sup> The Draft agreed with the findings of this EPA document. Draft, at 3-28 through 3-32 (discussing the plethora of values associated with riparian areas and then detailing the vast decline in the quality of riparian areas), Appendix T, at 185 (stating that implementation of the preferred alternative will have residual undesirable processes, such as desertification, that will likely remain for decades and even longer after livestock management is changed).

In another document, the EPA documented grazing's adverse environmental impacts on riparian areas. EPA, *Monitoring Protocols to Evaluate Water Quality Effects of Grazing Management on Western Rangeland Streams*, 910/R-93-017, at 7-15 (1993). This document stated that "grazing has potentially detrimental effects on stream banks, water column, aquatic life, stream channel, and riparian vegetation." *Id.* at 7. For example, nutrients from animal waste stimulate algal and aquatic plant growth at very low concentrations. At excessive levels, this growth contributes to low dissolved oxygen levels at night, which is detrimental to beneficial uses. *Id.* at 8. However, nutrient loss is minimal on streamside pastures in good condition when the animals stay in the uplands and do not defecate in the stream. *Id.*

The document also found that grazing livestock in riparian areas increases fecal coliform counts beyond natural background levels. *Id.* at 10. "The primary mechanism for bacterial contamination appears to be direct deposition of fecal material in the stream or transport of fecal material to the stream via overland flow." *Id.* When cows defecate directly in the stream, the bacteria settle in the sediment on the bottom of the stream and become resuspended when water flows increase or animals walk through streams. *Id.*

The EPA noted that "[r]iparian zones are often grazed more heavily than upland zones." *Id.* at 11. This grazing adversely effects riparian environments by "changing, reducing, or eliminating riparian areas through channel widening, channel aggrading, or lowering of the water table. Generally, in grazed areas, stream channels contain more fine sediment, stream banks are more unstable, banks are less undercut, and summer water temperatures are higher than streams in

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<sup>4</sup> The EPA document went on to state:

The deteriorated condition of watershed represents an enormous economic loss of potential livestock forage forgone. The loss of other values also is high. Many once-productive fish and wildlife populations have been eliminated or greatly reduced over wide areas of land. Degradation of streams and riparian habitats for migratory fish and waterfowl adversely affects economies thousands of miles away. Erosion-produced sediments reduce the quality and seasonal quantity of water supplies and shorten the economic life of irrigation and hydroelectric reservoirs critical to many western economies. The legacy of post land abuse and resultant deterioration in overall productivity has important implications for contemporary management: It has made remaining healthy riparian areas both more valuable and more vulnerable.

Their relative scarcity enhances the value of riparian areas for livestock forage, for fish and wildlife, and for regulating the seasonal timing and quality of water yielded from watershed. Deteriorated riparian areas are more vulnerable to the increased stress of concentrated and accelerated runoff from degraded uplands. Depleted upland vegetation furthers the natural tendency of livestock to concentrate in riparian areas.

When riparian areas are in a deteriorated condition they are far more sensitive to improper livestock grazing. Unless the season, duration and intensity of grazing are controlled, damage can be severe, long lasting and in some cases irreversible.

ungrazed areas.” Id.

There is widespread agreement among federal agencies that riparian ecosystems contain the vast majority of values on BLM rangelands. Likewise, there is widespread agreement that grazing within riparian areas severely degrades those values and can cause them to be permanently destroyed. This consensus provides the BLM with ample evidence to exclude riparian areas from grazing districts because they are not chiefly valuable for grazing. In fact, grazing those areas causes the nation to suffer a net loss in values derived from public lands. These facts demonstrate that the BLM’s refusal to reclassify riparian areas within grazing districts violates the TGA. Therefore, the BLM has also violated NEPA’s requirement that such classification decisions be consistent with all environmental laws and FLPMA’s requirement that classification decisions employ multiple use principles.

Although riparian areas provide the most obvious example of lands that must be reclassified out of grazing districts, there are numerous other lands that are not “chiefly valuable for grazing” and must also be reclassified. For instance, wild and scenic rivers, wilderness areas, research natural areas, and areas of critical environmental concern are all areas whose chief value is not for livestock grazing. All of these areas must be removed from grazing districts and the Department must establish rules and regulations that govern BLM’s reassessments of such classifications in the land use planning process.

## VI. THE SECRETARY MUST PROMULGATE REGULATIONS FOR THE CLASSIFICATION OF GRAZING DISTRICTS

Congress first ordered the Secretary to promulgate regulations to implement the TGA’s classification scheme when it passed the Act in 1934. 43 U.S.C. § 315a (“The Secretary of Interior . . . shall make such rules and regulations . . . necessary to accomplish the purposes of this Act and to insure the objects of such grazing districts, namely, to regulate their occupancy and use, to preserve the land and its resources from destruction or unnecessary injury, to provide for the orderly use, improvement, and development of the range . . .”). This mandate was never followed with regard to establishing rules for determining what lands are “chiefly valuable for grazing.”

More recently, FLPMA has reinforced the Secretary’s duty to promulgate such regulations. In section 1701(a)(5), Congress declares that, “in administering public land statutes and exercising discretionary authority granted by them, the Secretary be required to establish comprehensive rules and regulations after considering the views of the general public.” 43 U.S.C. § 1701(5). Congress reaffirmed this mandate in the section of FLPMA titled, “Regulations for implementation of management, use, and protection requirements; violations; criminal penalties,” by stating, “The Secretary shall issue regulations necessary to implement the provisions of this Act with respect to the management, use, and protection of the public lands, including the property located thereon.” 43 U.S.C. § 1733 (emphasis added).

Under these provisions, and the legislative history as described above, either the Secretary’s 64-year delay under the TGA or his 22-year delay under FLPMA in promulgating such regulations is contrary to law and must be remedied. The language of the TGA and FLPMA

requiring the Secretary to promulgate such regulations is clear and unambiguous. Therefore, the Secretary must promulgate such regulations. *Oregon Natural Resources Council v. Lyng*, 882 F.2d 1417, 1426-27 (9th Cir. 1989); *Newman v. Chater*, 87 F.3d 358, 361 (9th Cir. 1996); *NRDC v. Jamison*, 815 F.Supp. 454 (D.D.C. 1992).

## VII. CONCLUSION

Congress sought to insure that society derived the maximum amount of benefits from public lands and to reverse the decades of destruction due to overgrazing with the passage of the TGA. The TGA requires the Secretary to classify lands as “chiefly valuable for grazing” only when that land has little value for any other use. Before making such a classification, the Secretary must carefully study public lands for narrowly defined characteristics and classify land as grazing districts only if it contains such characteristics. When making such classification decisions, the Secretary must develop an adequate administrative record to demonstrate that his decision is consistent with the TGA’s requirements.

FLPMA reaffirmed and strengthened the TGA’s mandate by directing the Secretary to reassess all of his prior classification decisions for their consistency with multiple use principles. These principles require the Secretary to consider the ecological values of public lands during the classification process. Additionally, if a use or classification is causing harm to an ecologically sensitive area, the Secretary must reclassify the area or discontinue the use.

The Secretary’s duty to study and assess the impacts of his classification decisions and to make the required findings is reinforced by the NEPA. NEPA requires the Secretary to use all available information and to collect new information on the ecological values of an area when reassessing his classification decisions. The Secretary must also make formal findings that his classification decision is consistent with all applicable environmental laws.

The Secretary has failed to abide by the requirements of the TGA. The DOI allowed cattle ranchers, the same self-interested individuals who had caused and contributed to the ecological destruction of public lands prior to the 1930’s, to decide which public lands were chiefly valuable for grazing. Not surprisingly, areas that contained a wealth of watershed, wildlife, and public health and safety values were arbitrarily classified as grazing districts. The Secretary also completely ignored his heightened duties concerning classification decisions under the FLPMA and the NEPA. As a direct result of the Secretary’s disregard for his mandatory duties, riparian areas throughout the western United States are either in their worst ever ecological condition or have been forever destroyed. To remedy this administrative nonfeasance, the Secretary must immediately initiate a rulemaking establishing substantive and procedural standards to govern BLM’s discretion when reviewing the appropriateness of grazing district classifications.

Accordingly, Petitioners respectfully request that the Secretary begin rulemaking. These regulations must contain detailed standards for determining which parcels of public lands are chiefly valuable for grazing when BLM prepares, amends, or otherwise updates an LRMP under FLPMA. Accordingly, such regulations must also incorporate the FLPMA’s multiple use mandate as described in this petition. Commensurate with the importance of this classification decision, the regulations must require that the BLM use the best available scientific evidence to

substantiate its findings. If vital information on an area's ecological values is lacking or outdated, the regulations must require the BLM to create new data and use it when making classification decisions. Finally, consistent with the requirements of the FLPMA and the NEPA, the BLM's assessment of conditions and findings of value must be conducted in the context of an iterative decisionmaking process with full public participation.

DATED this \_\_\_\_\_ day of October, 1998.

Respectfully submitted,

JACK K. STERNE -- OSB #95522  
Attorney for Petitioners