

MANAGING THE MONUMENT: COWS AND CONSERVATION IN GRAND STAIRCASE-ESCALANTE NATIONAL MONUMENT

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Mr. French: So you leased his cattle, but he got all the gain. Fair enough? Is that correct?

Mr. Hedden: That's correct.

Mr. French: That certainly is not a standard kind of leasing operation that most ranchers engage in, is it?

Mr. Hedden: I've been telling you again and again, we're not a standard grazing company.

Mr. French: And your goals are different than traditional ranchers', aren't they?

Mr. Hedden: Yes, they are.

Hearing Transcript (Testimony of Bill Hedden, Executive Director, Grand Canyon Trust), *LeFerve v. BLM*, U.S. Department of Interior Office of Hearing and Appeals, (Sept. 9, 2005).

Abstract

In 1996, President Clinton short-circuited decades-long negotiations over the use of contested western lands and stunned Utah's political leaders when he designated close to 2 million acres in their state as the Grand Staircase-Escalante National Monument (GSENM). Clinton's proclamation charged the Bureau of Land Management (BLM), for the first time in its history, with responsibility for managing a national monument, and required the agency to manage the vast lands to balance conflicting multiple uses, including cattle grazing. Various statutes mandate that federal lands that have been determined to be chiefly valuable for grazing be actively grazed. However, anti-grazing activists saw in Clinton's action an opening to reduce or eliminate grazing on allotments contained within the newly designated national monument and found sympathy among the Monument's new managers. The question for conservation advocates and Monument managers was, in the absence of statutory change, could the administrative process be used to reduce or eliminate grazing in the Monument? This Article examines the twists and turns in the management, administrative, and legal processes that led an anti-grazing conservation group to become the largest rancher on the Colorado Plateau.

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I. HISTORY OF GSENM

On September 18, 1996, President Bill Clinton stood in Arizona at the edge of the Grand Canyon and proclaimed that he was designating 1.7 million acres in Utah, north of the Grand Canyon, as the Grand Staircase-Escalante National Monument.¹ Clinton described the new monument as a “geologic treasure” and an “outstanding biological resource,” and asserted that its “vast and austere landscape embraces a spectacular array of scientific and historic resources...[I]t is a place where one can see how nature shapes human endeavors in the American West, where distance and aridity have been pitted against our dreams and courage.”² In creating GSENM, Clinton invoked presidential authority to designate national monuments under the Antiquities Act of 1906,³ but he also declared that “nothing in this proclamation shall be deemed to affect existing permits or leases for, or levels of, livestock grazing on federal lands within the monument; existing grazing uses shall continue to be governed by applicable laws and regulations other than this proclamation.”⁴ In an unusual step, the proclamation delegated management responsibility for the Monument to the BLM within the Department of Interior (DOI), rather than to the more traditional monument managers in the National Park Service. Finally, the proclamation directed the DOI Secretary to prepare a management plan for the Monument and promulgate management regulations within three years.⁵

While Clinton’s creation of GSENM drew praise from many environmental activists, it was bitterly denounced by many of Utah’s federal, state, and local political leaders. Politicians, conservationists, administrators, scientists, and industry lobbyists both in and out of Utah, had worked for years, sometimes in a delicate dance and sometimes in a bare-knuckles brawl, to determine which lands to set aside as wilderness and which to keep open to resource development. A number of legislative proposals were being negotiated when Clinton’s announcement, kept under wraps within the Administration, was sprung with little warning.⁶ Utah Senator Orrin Hatch described the creation of the Monument as “the mother of all land grabs,”⁷ and complained that, “like the attack on Pearl Harbor, this massive proclamation came completely without notice to the public... By not consulting with the representatives of the people of Utah or with Congress,

¹ Proclamation No. 6920, 3 C.F.R. § 64 (2008).

² *Id.*

³ 34 Stat. 225 (1906) (codified as amended at 16 U.S.C. § 431 (2006)).

⁴ Proclamation No. 6920, 3 C.F.R. § 64,67 (2008).

⁵ *Id.*

⁶ See Janice Fried, *The Grand Staircase-Escalante National Monument: A Case Study in Western Land Management*, 17 VA. ENVTL. L.J. 477 (1998) (for a review of the Utah lands dispute leading up to Clinton’s proclamation); James R. Rasband, *Utah’s Grand Staircase: The Right Path to Wilderness Preservation?* 70 U. COLO. L. REV. 483 (1999).

⁷ Orrin Hatch, *Mother of All Land Grabs*, HIGH COUNTRY NEWS, Sept. 30, 1996, at 8, available at <http://www.hcn.org/issues/90/2796>.

President Clinton's proclamation is akin to a royal edict.”⁸ Utah Governor Mike Leavitt called Clinton’s proclamation “[o]ne of the greatest abuses of executive power in US history.”⁹ “The President's recent proclamation,” said Leavitt, “was a classic demonstration of why the founders of this nation divided power. Power unchecked is power abused.”¹⁰ Utah Representative James Hansen said,

Standing in another State, surrounded only by celebrities and those privileged enough to be invited, President Clinton locked up the largest deposit of compliance coal in the United States and took billions of dollars from the school children of Utah... This new monument had very little to do with preservation of lands but was focused on political advantage, photo opportunities, and stopping a legitimate coal project.¹¹

Representative Chris Cannon joined the criticism: “This monument was created without discussion, without consultation, and apparently without consideration... Essentially, the President chose to deliberately circumvent the democratic process.”¹²

The land set aside for GSENM falls entirely within Utah’s Kane and Garfield Counties, taking up almost half of Kane County.¹³ The Counties’ political and economic leaders also condemned the creation of the monument. Garfield County Commissioner and fifth generation rancher Dell LeFevre complained, “It was a chickenshit trick, as underhanded as you can get.”¹⁴ Another Garfield County Commissioner, Clare Ramsay, later called it “an illegal act done by a corrupt president.”¹⁵ The County rejected a \$100,000 Monument planning grant from the

⁸ *Establishing the Grand Staircase-Escalante National Monument: Hearing Before the House Subcommittee on National Parks and Public Lands*, 105th Cong. 30 (1997) (Statement of Sen. Orrin Hatch).

⁹ Tom Kenworthy, *Utah Governor to Request Monument*, USA TODAY, January 29, 2002, available at <http://www.usatoday.com/news/nation/2002/01/30/usat-monument.htm?loc=interstitial> skip.

¹⁰ *Establishing Grand Staircase-Escalante National Monument*, *supra* note 8, at 54 (statement of Gov. Michael Leavitt).

¹¹ *Establishing Grand Staircase-Escalante National Monument*, *supra* note 8, at 9 (statement of Rep. James Hansen). The creation of the monument effectively stopped a coal-mining project on lands to be included within GSENM, which had been the subject of a longstanding political battle. See generally David Kent Sproul, *Environmentalism and the Kaiparowits Power Project, 1964–1976*, 70 UTAH HISTORICAL QUARTERLY 356 (2002).

¹² *Establishing Grand Staircase-Escalante National Monument*, *supra* note 8, at 20 (statement of Rep. Chris Cannon).

¹³ See generally BRUCE GODFREY ET AL., KANE COUNTY AGRICULTURAL PROFILE (Utah State University Economics Department, 2005), available at <http://extension.usu.edu/files/publications/Kane%20county%20profile.pdf> (noting the federal government owns 83% of the land in Kane County); BRUCE GODFREY ET AL., GARFIELD COUNTY AGRICULTURAL PROFILE (Utah State University Economics Department, 2005), available at <http://extension.usu.edu/files/publications/Garfield%20county%20profile.pdf> (noting the federal government owns 89% in Garfield County).

¹⁴ Michelle Nijhuis, *Change Comes Slowly to Escalante Country*, HIGH COUNTRY NEWS, April 14, 2003, at 1, available at http://www.hcn.org/servlets/hcn.Article?article_id=13869.

¹⁵ Lee Davidson, *Grand Staircase*, DESERET MORNING NEWS, September 17, 2006, available at <http://deseretnews.com/dn/view/0,1249,645201833,00.html>.

federal government, calling it “blood money.”¹⁶ Several weeks after Clinton’s announcement, officials in Garfield, Kane and San Juan counties bulldozed four roads within GSENM boundaries, triggering a federal lawsuit.¹⁷

Local ranchers also reacted, fearing that the designation of the monument would bring more restrictions on grazing and more conflict with other users of the land. LeFevre complained, “I don’t even know what the Grand Staircase is—nobody around here even called this place by that name... We’ve got Easterners who don’t know the land telling us what to do with it. I’m a bitter old cowboy.”¹⁸ In Kane and Garfield Counties, schoolchildren marked the creation of the Monument by releasing 50 black balloons “to symbolically warn other states that the president could unilaterally lock away their lands, too,” and at a number of protests Clinton was burned in effigy.¹⁹

Several weeks after Clinton’s proclamation, the Utah Association of Counties (UAC), the Utah Schools and Institutional Trust Lands Administration, and Mountain States Legal Foundation, a public interest law firm, filed suit in federal court, complaining that Clinton had violated federal laws and acted *ultra vires* in creating the monument. Governor Leavitt later joined the suit.²⁰ The litigation lasted years, stretching into the Bush Administration, with the parties to the suit changing several times. Despite his 2000 campaign promises to reverse President Clinton’s designation of national monuments, President Bush continued litigation in favor of the creation of GSENM.²¹ In April 2004, the Utah District Court upheld Clinton’s proclamation, arguing that “when the President is given such a broad grant of discretion as in the Antiquities Act, the courts have no authority to determine whether the president has abused his discretion... To do so would be to impermissibly replace the President’s discretion with that of the judiciary.”²² The Court also ruled that various federal statutes, including the National Environmental Policy Act (NEPA)²³ and the Federal Land Policy and Management Act

¹⁶ Paul Larmer, *Beauty and the Beast: The President’s New Monument Forces Southern Utah to Face its Tourism Future*, HIGH COUNTRY NEWS, April 14, 1997, at 1, available at http://www.hcn.org/servlets/hcn.Article?article_id=3148.

¹⁷ Larry Warren, *UT Counties Bulldoze the BLM, Park Service*, HIGH COUNTRY NEWS, October 28, 1996, available at http://www.hcn.org/servlets/hcn.Article?article_id=2868. See also *S. Utah Wilderness Alliance v. BLM, et al.*, 425 F.3d 735 (10th Cir. 2005). The creation of GSENM added another complication to an on-going dispute between the counties and the BLM over roads and rights of way on federal lands.

¹⁸ John Tierney, Editorial, *The Sagebrush Solution*, N.Y. TIMES, July 26, 2005 at A17.

¹⁹ Paul Larmer, *A Bold Stroke: Clinton Takes a 1.7 Million Acre Stand in Utah*, HIGH COUNTRY NEWS, September 30, 1996, available at <http://www.hcn.org/issues/90/2795>.

²⁰ Consolidated in *Utah Ass’n of Counties v. Bush*, 316 F.Supp.2d 1172 (D.Utah 2004).

²¹ William Perry Pendley, *Natural Resources Policy Under the Bush Administration: Not What it Says But What it Has Done in Court*, 14 DUKE ENVTL. L. & POL’Y F. 313 (2004).

²² *Utah Ass’n of Counties*, 316 F. Supp.2d at 1183-84.

²³ 42 U.S.C. § 4321(a) (2006).

(FLPMA)²⁴ requiring public consultation and input into administrative decisions, do not apply to the president.²⁵

II. CONFLICT IN THE MONUMENT: COWS AND CONSERVATION

At the time of its creation, tens of thousands of cattle already grazed hundreds of thousands of acres of the lands to be contained within GSENM boundaries, as they had for over a century. This section of Southern Utah was settled by Mormon pioneers in the 1870s, and its remote, rugged, and arid lands made farming tough, but offered cattle and sheep grazers wide-open range.²⁶ Over the next century, the region remained sparsely populated, but ranching, mining, logging, and oil drilling became vital. Livestock numbers peaked in the 1940s and gradually declined.²⁷ By the 1970s, new environmental laws, such as the Endangered Species Act (ESA),²⁸ brought closer scrutiny to grazing, and surrounding national parks brought increasing numbers of recreational users to the area.²⁹ By the time of the designation of GSENM in 1996, the livestock industry was economically marginal but remained central to the region's culture and identity, and the Monument's Proclamation provided for the continuation of grazing.

These lands had been part of the grazing districts created after the passage of the Taylor Grazing Act (TGA) in 1934,³⁰ and were administered by the BLM under a statutory mandate to manage them for multiple use, including resource extraction and grazing.³¹ Multiple use management had long generated conflict and challenges for public lands managers, and this was especially true as recreation enthusiasts demanded more access to these lands and conservationists demanded more protection.³² Critics of public lands grazing focused new attention on what

²⁴ 43 U.S.C. § 1732(a) (2006).

²⁵ *Utah Ass'n of Counties*, 316 F. Supp.2d at 1172. Mountain States Legal Foundation appealed to the Tenth Circuit, which dismissed the appeal in 2006 for lack of standing. See *Utah Ass'n of Counties v. Bush*, 455 F.3d 1094 (10th Cir. 2006); Eric Rusnak, *The Straw That Broke the Camel's Back? Grand Staircase-Escalante National Monument Antiquates the Antiquities Act*, 64 OHIO ST. L.J. 669 (2003); Janice Fried, *supra* note 6; Matthew Harrison, *Legislative Delegation and Presidential Authority: The Antiquities Act and the GSENM—A Call for New Judicial Examination*, 13 J. ENV. L. & LITIG. 409 (1998) (For a thorough examination of the details of the GSENM controversy).

²⁶ GREER K. CHESHER, *HEART OF THE DESERT WILD: GRAND STAIRCASE-ESCALANTE NATIONAL MONUMENT* (2000) (Chesher notes that this region was the last place to be mapped in the continental United States).

²⁷ *Id.*

²⁸ 16 U.S.C. § 1531 (2006).

²⁹ Zion National Park, Bryce Canyon National Park, and Glen Canyon National Recreation Area.

³⁰ 43 U.S.C. § 315 (2006).

³¹ Federal Land Policy and Management Act, 43 U.S.C. § 1701 (2006).

³² WILLIAM R. TRAVIS, *NEW GEOGRAPHIES OF THE AMERICAN WEST: LAND USE AND THE CHANGING PATTERNS OF PLACE* (2007); see also Mark W. Brunson & Lael Gilbert, *Recreationist Responses to Livestock Grazing in a New National Monument*, 56 J. OF RANGE MANAGEMENT 570-576 (2003).

they regarded as taxpayer subsidized but environmentally harmful activities on these fragile public lands. According to anti-grazing activist Andy Kerr,

[d]omestic livestock have done more damage to western federal public lands than the bulldozer and chainsaw combined...Cattle, sheep, horses, and goats chew and defecate their way through grasslands, deserts, and forests managed by the Bureau of Land Management, U.S. Forest Service, U.S. Fish and Wildlife Service, and the National Park Service...[T]hese livestock threaten sensitive species, trample vegetation, steal forage from native wildlife, accelerate soil erosion, spread noxious weeds, alter natural fire regimes, and reduce water quantity and quality.³³

In the 1990s, the Clinton Administration failed in its efforts to raise fees for public lands ranchers, but pushed through regulatory changes that allowed grazing permits to be acquired by those not already engaged in the livestock business and to use the permits for conservation purposes.³⁴ These grazing reforms provoked fierce resistance from ranchers and their allies.

The Clinton-Babbitt reforms were a reflection of a more radical push from conservation groups in the 1990s to end grazing on public lands altogether.³⁵ Some of these groups sought to bypass the traditional approach of lobbying for legislative reforms by paying ranchers to relinquish their grazing permits to the government so that they could be permanently retired. Payment to ranchers would come from private sources, but a movement emerged to have the federal government compensate ranchers who gave up grazing permits.³⁶ Kerr, head of the National Public Lands Grazing Campaign, described the effort as a “socially compassionate, policy efficient, politically expedient, and ecologically responsible way to end livestock grazing on public land.”³⁷ Some ranchers, economically strapped after years of drought, have been open to the proposal, but ranching industry trade associations have been adamantly opposed. Claiming that public lands grazing is important to the western livestock industry, the preservation of

³³ Mark Salvo & Andy Kerr, *The National Public Lands Grazing Campaign*, WILD EARTH, Fall/Winter 2001-2002 at 83; see also DEBRA L. DONAHUE, *THE WESTERN RANGE REVISITED: REMOVING LIVESTOCK FROM PUBLIC LANDS TO CONSERVE NATIVE BIODIVERSITY* (1999).

³⁴ See Karl N. Arruda & Christopher Watson, *The Rise and Fall of Grazing Reform*, 32 LAND AND WATER L. REV. 413 (1997).

³⁵ See National Public Lands Grazing Campaign, <http://www.publiclandsranching.org> (last visited Sept. 9, 2008). See also Sierra Club, *Federal Public Lands Grazing Policies*, <http://www.sierraclub.org/policy/conservation/grazing.asp> (last visited Sept. 9, 2008); Western Watersheds Project, <http://www.westernwatersheds.org> (last visited Sept. 9, 2008).

³⁶ See National Public Lands Grazing Campaign, *supra* note 35; Voluntary Grazing Permit Buyout Act of 2003, H.R. 3324, 108th Cong. (2003), available at <http://www.govtrack.us/congress/billtext.xpd?bill=h108-3324>. The Voluntary Grazing Permit Buyout Act was introduced in 2003 by Reps. Chris Shays (R-CT) and Raul Grijalva (D-AZ). It has been endorsed by numerous environmental groups, including the Sierra Club, Forest Guardians, and Western Watersheds Project.

³⁷ Mark Salvo & Andy Kerr, *Permits for Cash: A Fair and Equitable Resolution to the Public Land Range War*, 23 RANGELANDS 22 (2001).

open space, and the economies of the rural West, the National Cattlemen's Beef Association and the Public Lands Council issued a press release stating,

NCBA/PLC opposes buyout programs aimed at removing cattle and sheep from the lands. We oppose any federal incentives to eliminate grazing allotments or other parts of the infrastructure needed for livestock production on federal lands to succeed. In particular, we oppose the buyout proposal floated by the National Public Lands Grazing Campaign.³⁸

III. MANAGING THE MONUMENT: COWS OR CONSERVATION

A. GSENM Management Discretion

Clinton's proclamation, in effect, superimposed a national monument over grazing lands without obviously superseding traditional grazing management practices. In the process, it created management or administrative space within which BLM Monument managers could operate, but also subjected the agency to conflicting pressures from traditional multiple use constituencies and conservation constituencies.

BLM's management "space" or discretion was enhanced by statutory land use planning provisions that have been described as "hortatory and opaque," and judicial deference that has allowed BLM the flexibility to "decide similar questions differently."³⁹ GSENM's first Manager, A. Jerry Meredith, confirmed BLM's management latitude when he wrote that, given that "[t]he BLM has never managed a national monument...there are no national monument molds to break, no national monument traditions to bind us, and no national monument habits to overcome."⁴⁰ As a result, Meredith argued, the BLM "[has] the opportunity to try . . . something different—a management style that is a bit more flexible and adaptive."⁴¹ In meeting the Proclamation's mandate to create a management plan in three years, Meredith asserted that "the BLM has decided that it will not be bound by every aspect of guidance that exists,"⁴² and that "the rules we are using

³⁸ BeefUSA.org, *NCBA and PLC Oppose Grazing Buyout Programs*, <http://www.beefusa.org/goveGrazingPermitBuyouts.aspx> (last visited Jan. 27, 2009).

³⁹ ROBERT GLICKSMAN & GEORGE CAMERON COGGINS, *MODERN PUBLIC LAND LAW IN A NUTSHELL*, 257 (3rd ed. 2006). Justin Konrad argues that the Supreme Court, in *Norton v. S. Utah Wilderness Alliance*, 524 U.S. 55 (2004), narrowed the scope of reviewable BLM actions and, in effect, gave BLM plenary authority to ignore congressional mandates. See Justin C. Konrad, *The Shrinking Scope of Judicial Review in Norton v. SUWA*, 77 U. COLO. L. REV. 515 (2006).

⁴⁰ A. Jerry Meredith, *The BLM Planning Process*, in *VISIONS OF THE GRAND STAIRCASE-ESCALANTE: EXAMINING UTAH'S NEWEST NATIONAL MONUMENT* 99 (Robert B. Keiter, Sarah B. George, & Joro Walker, eds., 1998).

⁴¹ *Id.*

⁴² *Id.* at 100.

to develop the management plan for the Monument are minimal, and those that we do have are flexible.”⁴³

The flexibility and discretion enjoyed by the BLM made the Monument’s stakeholders anxious. Environmentalists who hailed the creation of the Monument were suspicious of entrusting its management to the BLM, given its close historical relationship with resource extraction interests.⁴⁴ Industry advocates and local political leaders, on the other hand, were wary about what they perceived to be the growing influence of conservationists with the BLM.⁴⁵ Ranching interests had already put up vigorous resistance to the Clinton Administration’s regulatory changes to rangeland management, some of which they viewed as opening the door to the elimination of public lands ranching.⁴⁶

Of course, despite BLM’s flexibility in managing grazing within the Monument, it still faced some statutory and regulatory constraints. The proclamation that created the Monument made clear that grazing in GSENM would continue to be governed by applicable laws and regulations.⁴⁷ Several statutes govern grazing on BLM-managed lands. The TGA of 1934 authorized the Secretary of the Interior to establish grazing districts “of vacant, unappropriated, and unreserved lands” which were “chiefly valuable for grazing and raising forage crops,” and to regulate the occupancy and use of these districts in order “to preserve the land and its resources from destruction or unnecessary injury, to provide for the orderly use, improvement, and development of the range.”⁴⁸ TGA also authorized the Secretary to issue permits to graze these districts, charge permittees a fee to graze, and regulate stock rates and seasons of use. Preference in the issuance of permits is given to landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, although the permit does not create a title to the land or its resources. Permits are for not more than ten years and may be renewed at the discretion of the Secretary, although grazing privileges “shall be adequately safeguarded.”⁴⁹

The National Environmental Policy Act of 1969 declared it the policy of the United States to “encourage productive and enjoyable harmony between man and his environment” and, therefore, required that, prior to any major federal action, agencies must conduct a comprehensive environmental impact analysis, assessing

⁴³ *Id.* at 99.

⁴⁴ See generally CHARLES F. WILKINSON, *CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE AMERICAN WEST* (1992).

⁴⁵ See Joan Hamilton, *A Bolder BLM: Ending the Orgy on the Public Domain* SIERRA, http://findarticles.com/p/articles/mi_m1525/is_n4_v78/ai_13180181 (last visited Jan. 27, 2009); Tony Davis, *BLM Chief Jim Baca Leaves Amid Cheers and Boos*, HIGH COUNTRY NEWS, February 21, 1994 at 3; ROBERT NELSON, *PUBLIC LANDS AND PRIVATE RIGHTS: THE FAILURE OF SCIENTIFIC MANAGEMENT* 151-165 (1995) (Clinton’s first BLM Director, Jim Baca, was regarded as a “radical” by ranchers, and had a rather short and stormy tenure).

⁴⁶ See Mark Epperson, *Public Lands Council v. Babbitt: Another Nail in the Coffin for Ranchers’ Claims to Semi-Ownership of Federal Lands?*, 22 PUB. LAND & RESOURCES L. REV 147 (2001).

⁴⁷ Proclamation No. 6920, 3 C.F.R. § 64 (2008).

⁴⁸ 43 U.S.C. §§ 315-316 (2006).

⁴⁹ *Id.*

the impact of proposed actions and alternatives.⁵⁰ In *NRDC v. Morton*, the Court ruled that NEPA requires the BLM to prepare an Environmental Impact Statement (EIS) to assess grazing impacts in each individual grazing district.⁵¹

The BLM's "organic act," FLPMA, declared it to be the policy of the United States to retain the public lands, and charged the BLM with responsibility to manage those lands on a multiple use-sustained yield basis.⁵² The principal or major uses for which the lands are to be managed include, "and [are] limited to, domestic livestock grazing, fish and wildlife development and utilization, [and] mineral exploration and production."⁵³ The BLM was also directed to prepare and maintain an inventory of all public lands and their resources; develop, maintain, and revise land use plans, with the involvement of state and local government officials, as well as with the public; and to take action to prevent unnecessary degradation of the lands.⁵⁴ Under FLPMA, existing permittees retain priority for renewal of a grazing permit, although BLM may cancel, suspend or modify a permit and specify the number of animals to be grazed and seasons of use, and make adjustments based on range conditions.⁵⁵ The law also required BLM to establish grazing advisory boards that include permittees and representatives of the livestock business,⁵⁶ but in *NRDC v. Hodel* a California District Court held that BLM may not delegate decision-making authority to permittees.⁵⁷

FLPMA mandated that BLM manage public lands according to land use plans, yet, according to Coggins, "it specifies neither schedules, procedures, nor content of land use plans, leaving most methods and details to secretarial discretion."⁵⁸ Coggins and Glicksman have argued that, under FLPMA, BLM has discretion to plan when, where and how it chooses, that its failure to plan may not be reviewable and that, even when reviewable, BLM land use plans are not reviewable for much.⁵⁹ Coggins presciently noted that BLM's "nearly unfettered administrative discretion could be a double-edged sword for all contending parties."⁶⁰ Rangeland managers might be very lenient about resource development standards under one administration, yet very restrictive under another administration. The uncertainty that may result from frequent policy shifts is, according to Coggins, "antithetical to the purpose of formal planning."⁶¹

In 1978, Congress passed the Public Rangelands Improvement Act (PRIA), reiterating a policy requiring BLM to take inventory of public lands and manage

⁵⁰ 42 U.S.C. § 4321 (2006).

⁵¹ *NRDC v. Morton*, 388 F. Supp. 829 (D.D.C. 1974).

⁵² 43 U.S.C. §1701 (2006).

⁵³ *Id.* at §1702(l).

⁵⁴ *Id.* at §§ 1711, 1712, 1732.

⁵⁵ *Id.* at § 1752(c), (a), (e).

⁵⁶ 43 U.S.C. § 1753(c).

⁵⁷ *NRDC v. Hodel*, 618 F. Supp. 848 (E.D. Cal. 1985).

⁵⁸ George Cameron Coggins, *The Developing Law of Land Use Planning on the Federal Lands*, 61 U. COLO. L. REV. 319 (1990) [hereinafter Coggins].

⁵⁹ Glicksman & Coggins, *supra* note 39, at 262, 258-9.

⁶⁰ Coggins, *supra* note 58, at 323.

⁶¹ *Id.*

those lands according to plans which promote multiple use.⁶² PRIA also recognized that “vast segments of the public rangelands” were less productive of livestock, habitat, recreation, and conservation benefits than they should be, and were at risk of further deterioration.⁶³ The law authorized larger federal appropriations for an “intensive public rangelands maintenance, management, and improvement program,” revised the formula for determining grazing fees, and encouraged experimental land stewardship programs.⁶⁴

BLM made controversial changes to grazing regulations in 1995.⁶⁵ Longstanding rules were changed to eliminate a requirement that permittees be “engaged in the livestock business” to qualify to hold a grazing permit.⁶⁶ “Conservation-use” permits were authorized by the new regulations, allowing a permit holder to engage in activities other than grazing for the ten-year duration of the permit in order to improve the health of the land.⁶⁷ The new rules also redefined a permittee’s grazing “preference” to mean a priority for forage allocation instead of an actual forage quantity.⁶⁸ Rules were also changed regarding ownership of range improvements, the circumstances under which permittees could be punished for law violations, and range health standards that land managers must seek to attain.⁶⁹ Ranchers challenged the new rules and the Wyoming District Court struck down most of the regulations, including new regulations on conservation-use permits and qualifications to hold a grazing permit.⁷⁰ On appeal, the Tenth Circuit reversed the District Court except on the issuance of conservation-use permits.⁷¹ The Court argued that TGA, FLPMA, and PRIA “unambiguously reflect Congress’s intent that the Secretary’s authority to issue ‘grazing permits’ be limited to permits issued for the purpose of grazing domestic livestock. None of these statutes authorized permits intended exclusively for ‘conservation use.’”⁷²

On behalf of ranching interests, the Public Lands Council appealed to the Supreme Court and in *Public Lands Council v. Babbitt*, the Supreme Court affirmed the Tenth Circuit decision upholding the new regulations.⁷³ In upholding the rule that an applicant need not be in the livestock business to qualify for a

⁶² 43 U.S.C. § 1901 (2006).

⁶³ *Id.* at §1901(a)(1).

⁶⁴ *Id.* at §§ 1901, 1904, 1905, 1908.

⁶⁵ Administration of Livestock Grazing—Exclusive of Alaska, 60 Fed. Reg. 9894 (Feb. 22, 1995).

⁶⁶ 43 C.F.R. §4110.1(a) (2008).

⁶⁷ 60 Fed. Reg. 9898 (Feb. 22, 1995).

⁶⁸ *Id.* at 9921.

⁶⁹ *Id.* at 9896-9898.

⁷⁰ See *Public Lands Council v. U.S. Dept. of Interior Secretary*, 929 F.Supp. 1436 (D. Wyo. 1996).

⁷¹ *Public Lands Council v. Babbitt*, 154 F.3d 1160 (10th Cir. 1998), *cert. granted*, 528 U.S. 926, (1999), *aff’d*, 529 U.S. 728 (2000). The Clinton Administration did not appeal the Tenth Circuit’s ruling invalidating conservation-use permits.

⁷² *Id.*

⁷³ 529 U.S. 728 (2000).

grazing permit, the Court sought to reassure ranchers who were concerned that individuals might “obtain a permit for what amounts to a conservation purpose and then effectively mothball the permit.”⁷⁴ According to the Court, this would be prohibited by the regulations: “The regulations specify that regular grazing permits will be issued for livestock grazing or suspended use...Under the regulations, a permit holder is expected to make substantial use of the permitted use set forth in the grazing permit.”⁷⁵

In managing grazing in the Monument, then, BLM would be constrained by statutes, regulations, and judicial rulings. However, these constraints are light and BLM has been granted broad management latitude.

B. Grand Canyon Trust’s Grazing Retirement Program

The designation in Utah of hundreds of thousands of acres of grazing lands as the Grand Staircase-Escalante National Monument created an opening for conservation groups to target monument lands for cattle removal and created fear among ranchers and local political leaders that the Monument’s managers would be sympathetic. Grand Canyon Trust (GCT), formed in 1985 to work for the protection and restoration of the Colorado Plateau, was positioned to move into this opening.⁷⁶ In its first decade, GCT focused primarily on visibility issues in the Grand Canyon and polluting emissions from the Navajo Generating Station, but in the mid-1990s it was approached by the Superintendent of the Glen Canyon National Recreation Area about a permittee who wanted to sell a grazing permit affecting the Canyonlands National Park. GCT negotiated a buyout and, with the Conservation Fund, raised the money to compensate the permittee for relinquishing the permit to the BLM in order to remove cattle from the allotment.⁷⁷ Over the next several years, GCT worked with a number of ranchers to buy or trade permits along the Escalante River in GSENM in order to remove cattle from ecologically sensitive areas. Other ranchers, some of whom were experiencing more and more conflict between their cattle and recreational users of the Monument or who anticipated further regulatory restrictions on grazing, approached GCT to arrange compensation for relinquishing grazing permits, and

⁷⁴ *Id.* at 747.

⁷⁵ *Id.*

⁷⁶ See <http://www.grandcanyontrust.org/about/history.php> (for criticism of GCT and its activities); Toni Thayer, *Why You Can’t Trust the Trust*, RANGE MAGAZINE (Winter 2000), available at www.rangemagazine.com/archives/stories/winter03/dont-trust.htm; RON DAVIS, *UNDUE INFLUENCE: WEALTHY FOUNDATIONS, GRANT DRIVEN ENVIRONMENTAL GROUPS AND ZEALOUS BUREAUCRATS THAT CONTROL YOUR FUTURE* (1999) (for a more general criticism of the political influence of conservation groups, including in the creation of GSENM).

⁷⁷ E-mail from Bill Hedden, Director, Grand Canyon Trust, to Raymond B. Wrabley Jr. (on file with author).

GCT developed a more expansive “Grazing Retirement Program.”⁷⁸ The program was described on its web site in 2003:

The Trust negotiates directly with willing ranchers to structure agreements in which the ranchers are compensated for relinquishing their grazing privileges. During these negotiations, the Trust also assures that after the privileges are relinquished the Bureau of Land Management (or other appropriate agency) will amend its resource management plans to cancel the subject grazing permits.⁷⁹

The Trust website also said: “Establishment of the new Grand Staircase/Escalante National Monument set the stage for the Trust’s most significant grazing retirement program thus far.”⁸⁰

Some activists, however, expressed concern that the buyout/relinquishment process would not withstand a legal challenge. In 1999, anti-grazing activist Jeff Burgess said, “Right now, if a third party came in and sued the BLM for the right to graze on those allotments in the monument, they would probably have to reissue the grazing permits in those areas retired under the Grand Canyon Trust’s plan.”⁸¹ GCT, however, was confident that the process was viable. GCT’s Utah Director Bill Hedden said, “We have strong support in this plan from the BLM staff. They’ve been farsighted about this. In that area, it is not likely they will change the management plan back.”⁸²

GCT’s buyouts in the late 1990s did have BLM support and attracted little attention or protest. By 2000, however, ranching interests became alarmed. In early 2000, GCT responded to a newspaper advertisement by rancher Brent Robinson who was seeking to sell a permit for the 55,000 acre Clark Bench Allotment in GSENM. The allotment had a history of conflict between grazing and recreational and wilderness uses. GCT also contacted the BLM to inquire whether the agency would be willing to perform an environmental analysis (EA) to determine the suitability of the allotment for grazing and other uses.⁸³ In response, BLM expressed an interest in considering an amendment to the land use plan to close the allotment to grazing to reduce land use conflicts, and to reallocate the forage to wildlife.⁸⁴ This was consistent with the process that had been worked out by GCT and BLM in the 1990s. GCT then agreed to pay Robinson \$108,000 to relinquish his permit to the BLM if the agency approved a plan to cancel grazing on the

⁷⁸ Post-Hearing Brief of Canyonlands Grazing Corporation at 4, *LeFevre, v. BLM*, U.S. Department of Interior Office of Hearings and Appeals (Nov. 15, 2005) [hereinafter “CGC Post-Hearing Brief”].

⁷⁹ Grand Canyon Trust: Grazing Retirements, www.grandcanyontrust.org/arches/grazing.html (last visited October 19, 2003) (the web site no longer refers to a grazing retirement program).

⁸⁰ *Id.*

⁸¹ Lisa Church, *Fun-hogs to Replace Cows in a Utah Monument*, HIGH COUNTRY NEWS, February 1, 1999 at 4, available at http://www.hcn.org/servlets/hcn.Article?article_id=4751.

⁸² *Id.*

⁸³ CGC Post-Hearing Brief, *supra* note 78, at 7.

⁸⁴ *Id.*

allotment. The agreement committed Robinson to support “all administrative actions necessary to permanently eliminate all livestock grazing use on the allotment.”⁸⁵ Robinson also agreed to assign GCT the lease of state school trust land in Kane County that had served as base property connected to the Clark Bench permit.⁸⁶ Also in 2000, GCT signed a similar agreement for the relinquishment of the Willow Gulch Allotment in GSENM, and was in negotiations with permittees on other allotments.⁸⁷ Under its agreements, GCT would compensate permit holders once the plan amendment was complete and the permit was relinquished. This left ranchers waiting for compensation while their grazing operations were on hold. It also left GCT only as an interested bystander in an EA process that may or may not lead to cancellation of grazing. In March 2001, in an effort to strengthen its standing in the planning process and to shift the financial risk off of the permittee, GCT established Canyonlands Grazing Corporation (CGC), a non-profit grazing corporation based in Utah. CGC would be able to “meet the mandatory qualifications to receive grazing permits from ranchers, to propose to BLM the retirement of grazing privileges where appropriate, [and] to carry out grazing operations where appropriate.”⁸⁸ According to the GCT website, “[t]he corporation allows us to simply buy permits from willing sellers and then negotiate their retirement directly with BLM as an affected permittee rather than merely as an interested bystander.”⁸⁹ The establishment of CGC represented a bit of a shift in GCT’s grazing retirement program in that GCT, through its subsidiary CGC, would now become the permittee and, depending on BLM’s administrative actions, may be forced to graze the allotments. GCT Director Bill Hedden called the grazing possibility Plan B.⁹⁰

As BLM’s preparation of EAs for Clark Bench and the other allotments dragged in to 2001, George Bush was sworn in as president and new administrators took over at the top levels of DOI and BLM. GCT sought assurance from Utah Congressman Chris Cannon that the Bush Administration would be supportive of the buyout process in which GCT had now invested significant resources.⁹¹ Representative Cannon secured a letter from new DOI Secretary Gale Norton in which she wrote:

⁸⁵ Robinson grazing permit agreement, *in* Administrative Record at 2250 submitted in *Stewart v. Kempthorne*, 593 F.Supp.2d 1240 (D. Utah 2008).

⁸⁶ CGC Post-Hearing Brief, *supra* note 78, at 8.

⁸⁷ *Id.* at 9-10.

⁸⁸ *Id.* at 4. CGC is a subsidiary of GCT and will often be referred to in this article as GCT.

⁸⁹ Grand Canyon Trust, *Grazing Retirements*, www.grandcanyontrust.org (last visited Oct. 19, 2003).

⁹⁰ Hearing Transcript at 989 (Testimony of Willard Hedden), *LeFevre v. BLM*, U.S. Department of Interior Office of Hearing and Appeals, (May 11, 2005) [hereinafter “Hearing Transcript”]. See 43 C.F.R. § 4140.1(a)(2) (2008) (a grazing permit may be cancelled for “failing to make substantial grazing use as authorized by a permit or lease for 2 consecutive fee years”).

⁹¹ CGC Post-Hearing Brief, *supra* note 78, at 12 (if the permits were relinquished but the allotments were not closed to grazing, then the Animal Unit Months (AUMs) could be allocated to another rancher, and GCT would be out the money it had paid for the relinquishment).

Voluntary relinquishments of grazing permits can provide a marketplace-oriented resolution for public land conflicts. These arrangements are generally ‘win-win’ situations, which can help stabilize the ranching community and help avoid involuntary retirement of permits when polarized resource conflicts are occurring. I agree this type of market-based solution can provide an excellent opportunity for local groups to work together to benefit the community and the land.⁹²

Several months later, in a letter to GCT, DOI’s Assistant Secretary for Policy, Management and Budget Lynn Scarlett reiterated “we remain committed to support your efforts to work with the ranchers within the Grand Staircase-Escalante National Monument to voluntarily retire their grazing permits. Because this initiative would be done in perpetuity, it is paramount that all affected parties reach a favorable solution.”⁹³ With this assurance, CGC completed an agreement to acquire the permit for the Last Chance Allotment, the largest in GSENM, along with the Big Bowns permit, offering the leases on state trust land as base property in its permit application.⁹⁴ In applying for the permits, CGC requested voluntary non-use of the grazing preference for “conservation and protection of the public lands.”⁹⁵ If the land use planning process resulted in closing these allotments to grazing, CGC would relinquish the permits to the BLM.

A draft EA for the Clark Bench and Willow Gulch Allotments was released in November 2001, along with a Notice of Intent to amend the GSENM management plan, beginning a 30-day public comment period.⁹⁶ According to the draft, the BLM’s preferred alternative or “proposed action” was “permanently closing the allotment to grazing. This alternative would remove cattle from the allotment and allocate the forage to other uses besides grazing, such as wildlife and riparian protection. With the absence of grazing, the allotment could become a research site where vegetation dynamics could be observed.”⁹⁷ While a Monument-wide grazing EIS had been underway since 2000, the proposed plan amendments asserted that, if

⁹² Gale Norton letter to Rep. Chris Cannon, *in* Administrative Record at 2263 submitted in *Stewart v. Kempthorne*, 593 F.Supp.2d 1240 (D. Utah 2008).

⁹³ Lynn Scarlett letter to Geoffrey Barnard, *in* Administrative Record at 2265 submitted in *Stewart v. Kempthorne*, 593 F.Supp.2d 1240 (D. Utah 2008).

⁹⁴ CGC Post-Hearing Brief, *supra* note 78, at 13 (in September 2001, CGC also began the process of acquiring the Clark Bench permit which, by the initial agreement with GCT, Brent Robinson had continued to hold pending its relinquishment).

⁹⁵ Hearing Transcript, *supra* note 90, at Exhibit 21a.

⁹⁶ Notice of Intent to Amend Plan of Grand Staircase-Escalante National Monument, 66 Fed. Reg. 59812 (November 30, 2001) (Notice of Intent to amend land use plans for Last Chance and Big Bowns allotments was issued January 28, 2002, 67 Fed. Reg. 3910, along with Environmental Assessment # UT-030-02-005, with a revised EA released on May 5, 2002).

⁹⁷ BUREAU OF LAND MANAGEMENT, PROPOSED AMENDMENT TO THE GRAND STAIRCASE-ESCALANTE NATIONAL MONUMENT MANAGEMENT PLAN, AND THE PARRIA MANAGEMENT FRAMEWORK PLAN TO REALLOCATE ANIMAL UNIT MONTHS (AUM’S) IN THE CLARK BENCH ALLOTMENT EA # UT-030-01-01, 6 (Nov. 2001).

adopted, “these decisions will not be reviewed or reanalyzed in the Livestock Management EIS.”⁹⁸ Local ranchers and public officials were shocked.

C. *The Legal Challenge to GSENM and GCT*

The draft EA reignited fears in Kane and Garfield Counties and among ranching advocates that the BLM’s Monument managers were conspiring with GCT to eliminate grazing in GSENM altogether, in violation of the explicit protections provided in the Proclamation and the laws. Worth Brown, chairman of the Canyon County Ranchers Association complained, “[a]pparently, the BLM has adopted a policy that would eliminate grazing from the monument. Contrary to President Clinton’s Proclamation which specifically preserved grazing, the BLM is working with preservation groups to put us out of business.”⁹⁹

Huge pressure was brought on the BLM to reverse course. Utah government officials, Kane and Garfield Counties, the Utah Association of Counties, the Utah Cattlemen’s Association, local ranchers, and members of the Cheyenne-based, pro-ranching Budd-Falen law firm were among those who reacted to the proposed plan amendments. State Representative Mike Noel, a retired career BLM employee, brought the EA to the Kane County Resource Committee, saying he was “very alarmed at the tone and nature of the document.”¹⁰⁰ According to Noel, “the EA was written to justify the ultimate retirement of grazing privileges” on the allotments.¹⁰¹ Noel also claimed that BLM insiders told him that “this is the first step” toward eliminating grazing in GSENM.¹⁰²

Kane County, led especially by Commissioner Mark Habbeshaw, considered various administrative and legal challenges to the process. GSENM Manager Dave Hunsaker was asked to address the County’s concerns at a meeting in December 2001. Some of those present at the meeting testified later that Hunsaker was defensive, and that he suggested that the EAs were “top-down driven,” that is, that GCT’s support from high-level DOI officials played a role in the proposed management plan amendments.¹⁰³ Representative Noel concluded from his conversations that Hunsaker was suggesting that the decision to close the allotments to grazing was too far along to be worth fighting.¹⁰⁴ However, Kane County, working with Garfield County, especially Commissioner Clare Ramsay, and with Budd-Falen, filed a formal protest of the proposed plan amendment on

⁹⁸ BUREAU OF LAND MANAGEMENT, PROPOSED AMENDMENTS TO THE ESCALANTE AND PARIA MANAGEMENT FRAMEWORK PLANS TO RETIRE ANIMAL UNIT MONTHS (AUMS) IN THE LAST CHANCE AND BIG BOWNS BENCH ALLOTMENTS EA # UT-030-02-005, 6 (Jan. 2002).

⁹⁹ *Southern Utah Ranchers Threaten Legal Action Against BLM*, SIERRA TIMES, March 5, 2002 (on file with author).

¹⁰⁰ Hearing Transcript, *supra* note 90, at 850 (Testimony of Rep. Mike Noel).

¹⁰¹ *Id.* at 852.

¹⁰² *Id.* at 861.

¹⁰³ *Id.* at 852. Hunsaker denied that there was any high-level pressure to produce a particular outcome. Hearing Transcript, *supra* note 90, at 56, 1459.

¹⁰⁴ *Id.* at 878.

April 1, 2002.¹⁰⁵ Land use planning regulations provide that any person who participated in the planning process and who may be adversely affected by the amendment of a resource management plan may file a written protest regarding issues that were raised earlier in the planning process. The agency director, whose decision is the final decision for the DOI, must render a prompt decision on the protest, setting forth in writing the reasons for the decision.¹⁰⁶

Habbeshaw and Noel also encouraged a number of ranchers to file applications for the grazing permits that the EAs implied had been relinquished by CGC for Clark Bench, Last Chance, Willow Gulch, and other allotments. According to rancher Trevor Stewart, Habbeshaw and Noel suggested that, “if we had an interest in it [the proposed plan amendment to cancel grazing], and stopping it, that we should go in and file over.”¹⁰⁷ In early 2002, ranchers Stewart, LeFevre, Worth Brown, James Brown, Wayne Phillips, and William Alleman filed applications for permits to graze the contested allotments in GSENM.

Other pressure was brought on BLM. The County Commissioners expressed concern to Utah Representative James Hansen who wrote a letter to BLM Director Kathleen Clarke, his former staffer. The Utah Cattlemen’s Association (UCA) complained to GSENM Manager Hunsaker, Utah BLM Director Sally Wisely, BLM Director Clarke, and higher level officials at DOI in Washington, DC, about what it perceived to be the anti-grazing bias of the EAs.¹⁰⁸ Richard Nicholas, of the UCA, testified that he told Clarke and DOI officials that the association wanted changes in the EAs or it would go to the press with complaints about BLM’s illegal collaboration with GCT to eliminate grazing in the Monument.¹⁰⁹ According to Nicholas, Clarke expressed her opposition to the proposed management plan amendments and to the GCT buyout/retirement process. He says that Clarke told him that DOI Secretary Norton was anxious to back away from her previous support for the process but that Assistant Secretary Scarlett was strongly attached to the “deal,” as were others at DOI.¹¹⁰ Clarke apparently encouraged the UCA to formally protest the proposed plan amendments.¹¹¹

The Utah legislature also weighed in. It passed, and Governor Mike Leavitt signed, legislation declaring, “the state opposes the relinquishment or retirement of grazing animal unit months in favor of conservation, wildlife or other purposes.”¹¹² The legislature also passed in two consecutive sessions, and Leavitt signed, an appropriation of \$50,000 to support the Counties’ legal challenges to the Monument’s managers.¹¹³

¹⁰⁵ Protests of subsequent plan amendments were also filed later in 2002.

¹⁰⁶ 43 C.F.R. § 1610.5-2 (2008).

¹⁰⁷ Hearing Transcript, *supra* note 90, at 459 (Testimony of Trevor Stewart, Noel’s son-in-law).

¹⁰⁸ Hearing transcript, *supra* note 90, at 670-81 (Testimony of Richard Nicholas).

¹⁰⁹ *Id.* at 673.

¹¹⁰ *Id.* at 675.

¹¹¹ *Id.* Nicholas also testified that BLM Director Clarke told him that she had been “rolled” by her superiors at DOI. *Id.* at 681.

¹¹² H.B. 264, 2005 Gen. Session (Utah 2005).

¹¹³ Hearing Transcript, *supra* note 90, at 868 (Testimony of Rep. Mike Noel).

Within the BLM there was also controversy. In internal comments on the preliminary EA for Clark Bench, Rangeland Management Lead Gregg Christensen wrote:

I know that Kane County commented and sited (sic) studies etc. stating that grazing could be beneficial so we are quoting everybody we can find to refute their studies and prove that grazing is detrimental to the environment to justify a closure...As I already said, we have shot ourselves (and possible [sic] the rest of BLM) in the head, maybe that was our intent. I hope that when we start writing the EIS you all are going to be able to change your tune and at least say that livestock grazing could, might, may be managed without ruining the earth.¹¹⁴

Another BLM staffer wrote, “We should not be taking this action. The EAs demonize grazing without proper or adequate analytical or technical support.”¹¹⁵ Bob Stager, also on the BLM staff, testified that he was not alone in believing that the EAs had been written to justify closing the allotments to grazing.¹¹⁶ Christensen expressed frustration that his comments on the draft would have no affect because “a decision has already been made.”¹¹⁷

The controversy created some uncertainty among the Monument managers. In a January 2002 briefing prepared for the DOI Assistant Secretary, Hunsaker defended BLM’s procedures and explained its position: “The Bureau supports private buy backs of grazing permits to the extent that they contribute to achieving the management objectives, as these buy backs do.”¹¹⁸ In a similar briefing a month later, Hunsaker reiterated the Bureau’s perspective, but added, “national level guidance on this matter could be beneficial to BLM field operations in order to clarify appropriate processes, prioritization methods, and evaluation tools for Field Office managers to employ.”¹¹⁹ Hunsaker later testified that, from the State BLM Office to the DOI Secretary’s office in Washington, “this process was extremely sensitive at the top levels.”¹²⁰ This was also reflected in UCA’s Nicholas’s testimony that, at a press conference in 2003, he asked Secretary Norton why, given her expressed commitment to multiple-use land management, she had issued

¹¹⁴ Gregg Christensen, Comments on Preliminary EA for Clark Bench, in Administrative Record at 3320 submitted in *Stewart v. Kempthorne*, 593 F.Supp.2d 1240 (D. Utah 2008).

¹¹⁵ Letter, *The GSENM’s Actions to Propose Closing Additional Grazing Allotments to Grazing via Environmental Analysis and Plan Amendment Updated with info Offered at the January 11th Briefing*, (January 22, 2002), in Administrative Record at 3323 submitted in *Stewart v. Kempthorne*, 593 F.Supp.2d 1240 (D. Utah 2008).

¹¹⁶ Hearing testimony, *supra* note 90, at 565-66 (Testimony of Bob Stager).

¹¹⁷ Gregg Christensen, Comments on Preliminary EA for Clark Bench, in Administrative Record at 3322 submitted in *Stewart v. Kempthorne*, 593 F.Supp.2d 1240 (D. Utah 2008).

¹¹⁸ Briefing prepared by Dave Hunsaker, Acting Manager, Grand Staircase-Escalante National Monument, to the Assistant Secretary, 2 (Jan. 18, 2002) (on file with the author).

¹¹⁹ *Id.* The same language seeking national level guidance was used in a May 2002 briefing.

¹²⁰ Hearing Testimony, *supra* note 90, at 1167.

a letter supporting GCT's efforts to buyout ranchers in GSENM to retire grazing, to which she replied, "I cannot answer that," and promptly ended the press conference.¹²¹

D. Grand Canyon Trust's Grazing Improvement Program

For GCT, the over-filing for its permits, the growing public controversy over its buyouts, and the potential for formal protests of the proposed land use amendments put its grazing retirement program strategy at risk. At the end of 2001, GCT had submitted a letter at the request of BLM staff, relinquishing the permits it held (and those on which it held liens but had not technically acquired), conditioned on the allotments being closed to grazing by a land use plan amendment.¹²² After being informed in early 2001 that the EA could only proceed if the relinquishments were made without conditions, GCT submitted a letter unconditionally relinquishing grazing privileges on the allotments. Now, if the BLM decided not to close the allotments to grazing, the relinquished permits, for which GCT had paid over \$1 million, could be reissued to other ranchers. Advice from legal counsel and, apparently from allies in DOI, led them to move toward implementing "Plan B"—to secure their control over the grazing permits, move toward the establishment of a livestock business, and potentially graze the allotments.¹²³ GCT's applications to acquire grazing privileges for the Last Chance and Big Bowns Allotments were approved by BLM in January 2002. As part of the transaction, GCT paid trespass fees for cattle that the previous permittee had abandoned on the allotment, and acquired rights to those cattle.¹²⁴ Four or five of those cattle were branded with CGC's brand and continued to graze the allotment.

On April 15, 2002, GCT sent a letter to the BLM withdrawing its "offers" to relinquish the permits. In the letter, GCT Director Hedden wrote, "Since writing these letters [relinquishing the permits], we have learned that relinquishment is not necessary or appropriate until the land use plan has been amended. Therefore, we withdraw all these offers to relinquish. We still fully intend to relinquish all grazing privileges...[I]f the land use plan is amended as proposed in the Preferred Alternative in the EA."¹²⁵

Several months later, the threat to GCT's retirement strategy was reaffirmed by a legal opinion about the process issued by the DOI Solicitor's Office. On the last day of the Clinton Administration, DOI Solicitor John Leshy had issued an opinion on the relinquishment process, which said, "I conclude that these statutes [TGA, FLPMA, PRIA] provide ample authority for BLM to retire livestock

¹²¹ *Id.* at 686.

¹²² Letter from Willard Hedden, to Gregg Christensen (Dec. 3, 2001), *in* Administrative Record submitted in *Stewart v. Kempthorne*, 593 F.Supp.2d 1240 (D. Utah 2008).

¹²³ *See* CGC Post-Hearing Brief, *supra* note 78 (After paying Robinson for relinquishing the Clark Bench permit, GCT had agreed with Robinson to allow him to graze cattle on the allotment, despite drought conditions, at greatly reduced rates, until the relinquishment was accepted and the allotment closed to grazing).

¹²⁴ *Id.* at 15.

¹²⁵ *See* Hearing Transcript, *supra* note 90, at 2544 (The Hedden Letters).

grazing permits in appropriate circumstances.”¹²⁶ In October 2002, DOI Solicitor William Myers issued an opinion modifying that conclusion.¹²⁷ On the one hand, Myers implied that an unconditional permit relinquishment was not necessary before a land use plan amendment retiring grazing could be considered: “BLM has the authority to consider, through the land use planning process, a permittee’s *proposal* to relinquish a grazing permit in order to end grazing on the permitted lands and to assign them for another multiple use.”¹²⁸ On the other hand, Myers raised the procedural bar that had to be cleared before grazing could be retired:

There must be a proper finding that lands are no longer chiefly valuable for grazing in order to cease livestock grazing within grazing districts...If BLM concludes that the lands still remain chiefly valuable for these purposes, the lands must remain in the grazing district. As such, they would remain subject to applications from other permittees for the forage on the allotment that is relinquished to BLM¹²⁹

Further, according to Myers, “[a] decision to foreclose livestock grazing is not permanent. It is subject to reconsideration, modification and reversal in subsequent land use plan decisions. Only Congress may permanently exclude lands from grazing use.”¹³⁰ This statutory interpretation by DOI contributed to the evolution of GCT’s grazing retirement program, as they moved further along on “Plan B.”

E. GSENM Management Shift

In late 2002, the Monument management denied the protests of the land use plan amendments filed by Kane and Garfield Counties: “After careful review of your protest letters, we conclude that the Utah State Director and the Monument Manager followed the applicable planning procedures, laws, regulations and policies and considered all relevant resource information and public input in developing the Proposed Amendments.”¹³¹ However, in response to the protests, and apparently to the Myers memo, the BLM decided to modify the proposed plan amendment, which originally was to permanently close the allotments in question to grazing, and to exclude those closed allotments from review by the on-going Monument-wide EIS. Instead, the Monument managers decided that if grazing permits were relinquished, the allotments would be put in temporary non-use status

¹²⁶ Memorandum from the Office of the Solicitor to BLM, (Jan. 19, 2001) (on file with the author).

¹²⁷ Solicitor’s Opinion M-37008 (October 4, 2002) (on file with the author).

¹²⁸ *Id.* at 4 (emphasis added).

¹²⁹ *Id.* at 2-3.

¹³⁰ *Id.* at 4. Prior to his appointment by President Bush to the Solicitor’s position, Myers had served as a lobbyist for public lands ranchers, taking the lead as head of the Public Lands Council’s efforts to block Clinton era rangeland reforms.

¹³¹ Letter from Kevin Whalen, BLM to Joe C. Judd, Chairman, Kane County Commission (Dec.27, 2002), *in* Administrative Record submitted in *Stewart v. Kempthorne*, 593 F.Supp.2d 1240 (D. Utah 2008).

“while these areas are analyzed as part of the Livestock Management Environmental Impact Statement for all grazing allotments administered by Grand Staircase-Escalante National Monument...Following EIS completion, livestock grazing use in the allotments could remain unchanged, could cease or could be reduced.”¹³²

This modification of the plan amendment was made official in the Decision Record that was released by BLM in January 2003:

It is my decision to amend the Paria Management Framework Plan (MFP) to accept voluntary relinquishment of a permit for livestock grazing on the Clark Bench Allotment. The record supports this decision to accept the voluntary relinquishment and to amend the MFP to provide for the cessation of grazing on the allotment. This decision will be reviewed, and may be revised, based on the fact-specific circumstances related to the preparation of a grazing plan and Environmental Impact Statement for Grand Staircase-Escalante National Monument.¹³³

In response, GCT wrote to the BLM that, given the deferral of a grazing decision on the allotments until the completion of the EIS, and the new standard that grazing retirement would require a finding that the lands were no longer chiefly valuable for grazing and raising forage crops, GCT would not relinquish its permits and, instead, would hold them in non-use pending the outcome of the EIS.¹³⁴

In February 2003, BLM approved the transfer of the Clark Bench Allotment grazing preference from Robinson to CGC and a grazing permit was issued to CGC in March 2003. During the previous two years, severe drought conditions throughout the area of GSENM had prompted BLM to request ranchers to greatly reduce grazing or take non-use on their allotments, which GCT did. In September 2003, another BLM letter to permittees suggested increased flexibility in stocking levels and GCT made an agreement with Robinson to allow him to graze Clark Bench with 72 cattle, which would technically be leased to and controlled by GCT, with Robinson acting as its agent.¹³⁵ The same arrangement was continued for the following grazing season (2004–2005).¹³⁶ By this time, GCT’s website no longer

¹³² Letter from David Hunsaker, GSENM Manager, to the Interested Public, (Jan. 16, 2003) (on file with the author).

¹³³ UNITED STATES DEPARTMENT OF THE INTERIOR, BUREAU OF LAND MANAGEMENT, DECISION RECORD AND FINDING OF NO SIGNIFICANT IMPACT FOR AN AMENDMENT TO THE PARIA MANAGEMENT FRAMEWORK PLAN (2002), *in* Administrative Record at 3169 submitted in *Stewart v. Kempthorne*, 593 F.Supp.2d 1240 (D. Utah 2008) (The same language was included in the Decision Record for Last Chance and Big Bowns released the same day).

¹³⁴ Letter from CGC to Dave Hunsaker, GSENM (Feb. 12, 2003), *in* Administrative Record at 2590-2591 submitted in *Stewart v. Kempthorne*, 593 F.Supp.2d 1240 (D. Utah 2008).

¹³⁵ CGC Post-Hearing Brief, *supra* note 78, at 24.

¹³⁶ *Id.*

referred to its Grazing Retirement Program but instead described its Grazing Improvement Program.

Also in September 2003, the BLM formally denied the “file over” grazing applications of ranchers Stewart, LeFevre, Brown, Alleman, and Phillips. The application denials were appealed to the DOI Office of Hearings and Appeals, and Kane and Garfield Counties, along with CGC moved to intervene. The appeals were consolidated and heard by Administrative Law Judge (ALJ) James Heffernan. The ranchers and counties (appellants) alleged that the Monument’s managers engaged with GCT in an unlawful “scheme” to end livestock grazing in GSENM.¹³⁷ In carrying out this scheme, according to the appeal, the Monument’s managers illegally transferred grazing privileges to CGC, issued grazing permits for reasons other than grazing, in violation of various statutes and Supreme Court rulings, and denied appellants’ grazing applications on the basis of a prejudged political decision.¹³⁸ Appellants asked the ALJ to cancel all grazing preferences issued by the BLM to CGC, set aside the Monument managers’ decisions, and remand the matter to the BLM for reconsideration of appellants’ applications for grazing preferences.

Appellants argued that the transfer of grazing privileges for the six allotments to CGC was unlawful because CGC had already voluntarily relinquished them to the BLM, and thus no longer held a preference.¹³⁹ According to the appellants, the grazing regulations, along with the BLM Manual Handbook, imply that a relinquishment is effective when received and is not subject to approval or disapproval by the BLM. CGC had submitted letters to BLM unconditionally relinquishing the preferences they had purchased and BLM released Notices of Intent to Amend Plan, in which the agency indicated that the “amendment [would] be addressed through an EA.”¹⁴⁰ The Notice of Intent to Amend Plan stated that “[t]he permittee has voluntarily relinquished all of the existing grazing privileges on the Big Bowns Bench grazing allotment.”¹⁴¹ The Utah BLM Director then released a Decision Record to amend the management plans “to accept the voluntary relinquishment of a permit for livestock grazing” on the allotments.¹⁴² Appellants argued that the Monument managers’ interpretation of the relinquishments as “proposals” that could be withdrawn was clearly erroneous.

¹³⁷ Post-Hearing Brief of Appellants at 3, *LeFevre v. BLM*, U.S. Department of Interior Office of Hearings and Appeals (Nov. 14, 2005) [hereinafter “Appellant’s Post-Hearing Brief”].

¹³⁸ *Id.* at 27-28.

¹³⁹ Letter from Willard Hedden, Secretary-Treasurer, Canyonlands Grazing Corporation, to Gregg Christensen, Bureau of Land Management (Jan. 15, 2002) (on file with the author).

¹⁴⁰ 67 Fed. Reg. 3910 (Jan. 28, 2002); 66 Fed. Reg. 59812 (Nov. 30, 2001).

¹⁴¹ 67 Fed. Reg. 3910 (Jan. 28, 2002).

¹⁴² UNITED STATES DEPARTMENT OF THE INTERIOR, BUREAU OF LAND MANAGEMENT, DECISION RECORD AND FINDING OF NO SIGNIFICANT IMPACT FOR AN AMENDMENT TO THE PARIA ESCALANTE MANAGEMENT FRAMEWORK PLANS BIG BOWNS AND LAST CHANCE ALLOTMENTS (2003), *in* Administrative Record at 2556-2558 submitted in *Stewart v. Kempthorne*, 593 F.Supp.2d 1240 (D. Utah 2008); UNITED STATES DEPARTMENT OF THE INTERIOR, BUREAU OF LAND MANAGEMENT, DECISION RECORD AND FINDING OF NO SIGNIFICANT IMPACT FOR AN AMENDMENT TO THE PARIA MANAGEMENT FRAMEWORK PLAN CLARK BENCH ALLOTMENT (2003), *in* Administrative Record at 3169-3170 submitted in *Stewart v. Kempthorne*, 593 F.Supp.2d 1240 (D. Utah 2008).

“There is no rational explanation for how the BLM can undo an act over which it had absolutely no control.”¹⁴³

Appellants also claimed that the Monument managers’ issuance of grazing permits to CGC was unlawful because CGC was not qualified to acquire a permit. According to appellants, TGA and FLPMA require a permittee to be a stock owner engaged in the livestock business. By appellants’ calculations, by 2004 CGC was permitted to run 829 cattle on its six allotments and had purchased eleven.¹⁴⁴ They asserted that CGC was not in the livestock business and had no intent to graze its allotments. According to appellants, CGC has no employees or hired-hands, “does not own any water rights, horses, tack for horses, hay, or feed,” is unsure of “how many calves were born last year, how many calves were sold, when they were sold, to whom they were sold, and whether to expect a calf crop this upcoming year.”¹⁴⁵

The appeal also alleged that BLM unlawfully issued grazing permits for reasons other than grazing. “The BLM lack[ed] the statutory authority to issue grazing permits intended exclusively for conservation use [citation omitted]. When the BLM issues a permit under the TGA, the primary purpose of the permit must be grazing.”¹⁴⁶ According to appellants, the evidence is “overwhelming” that CGC acquired grazing permits for conservation purposes and ultimately to end grazing in GSENM. Appellants referred to CGC’s repeated requests for non-use of its AUMs and dismissed CGC’s meager grazing operations, which they alleged were prompted by the legal proceedings. The appellants argued that, prior to the protests of the land use plan amendments by Kane and Garfield Counties and the grazing applications of appellants, “there exists no comment, suggestion, charge, proposal, or testimonial of any kind in which Canyonlands references an intent to make actual grazing use of its permitted AUMs.”¹⁴⁷

Finally, the appeal points to criticism of the EAs and proposed plan amendments from career BLM range specialists to argue that Monument managers made a political decision in collaboration with GCT and DOI to retire grazing in GSENM despite the law, the science, and the GSENM Proclamation. According to the appellants, the allotments proposed to be closed were in good condition and retirement of grazing was not supported by the science.¹⁴⁸ Letters from Norton and Scarlett supporting the GCT buyout process, testimony that the BLM Director felt “rolled” by her superiors in DOI, and GSENM Manager Hunsaker’s apparent comments that the process was “outside-driven” or “top-down driven” led appellants to complain that BLM collaborated illegally with GCT to retire grazing in the Monument: “The action of the BLM...undermines the objectives of the TGA, and permits wealthy conservation organizations to gain control of vast areas

¹⁴³ Appellant’s Post-Hearing Brief, *supra* note 137, at 47.

¹⁴⁴ *Id.* at 92.

¹⁴⁵ *Id.* at 98-99.

¹⁴⁶ *Id.* at 104.

¹⁴⁷ *Id.* at 101-102.

¹⁴⁸ *Id.* at 113.

of public land and then take no responsibility for their proper management.”¹⁴⁹ In fact, appellants allege that the BLM unlawfully transferred grazing preferences to CGC in an effort to avoid resumption of grazing on these allotments.¹⁵⁰

BLM’s response to the appeal, emphasized the decision-making discretion granted to the Monument managers by relevant statutes and the deference to which those decisions are entitled by precedent: “It is well-settled that BLM has substantial discretion in implementing the [TGA].”¹⁵¹ Its decision to transfer grazing preferences and permits to CGC, and to deny the applications of the appellants, according to BLM, were rational and substantially complied with grazing regulations and therefore should not be set aside.¹⁵²

In response to appellants’ argument that BLM unlawfully transferred grazing preferences to CGC because CGC had sent letters of relinquishment that became effective when received, BLM argued that grazing privileges had not been relinquished and that there is no legal support for the contention that relinquishment takes effect when received. Grazing regulations do not specify a relinquishment process and the BLM Manual is “vague.”¹⁵³ GSENM Manager Hunsaker testified that he viewed CGC’s relinquishment as “offers to relinquish” that BLM could accept or reject following completion of the planning process, a rational view entitled to deference given the “absence of specific regulatory or other guidance on the matter.”¹⁵⁴ BLM also argued that the Monument manager’s interpretation reflects the “special relationship” between the BLM and permittees founded on “cooperation, consultation, and coordination in grazing matters” that should allow a permittee who has incurred significant expense to rescind an offer of relinquishment.¹⁵⁵ Hunsaker, therefore, was justified in deciding that CGC had withdrawn its offer to relinquish grazing privileges, making them unavailable to other applicants.

In response to appellants’ allegation that BLM’s issuance of grazing permits to CGC was unlawful because CGC was not qualified to acquire a permit, BLM argued its determination that CGC was qualified was a “reasonable and correct” interpretation of the plain language of grazing regulations, and that its interpretation was entitled to deference.¹⁵⁶ According to the BLM, there is no language in the statutes or regulations that require a grazing permit applicant to be in the livestock business or have intent to graze at the time of the application. In fact, if “intent to graze” were a qualification to acquire a grazing permit, BLM would have to make a subjective determination, with many potential complications, with no statutory mandate or clear standards to ensure fairness and

¹⁴⁹ *Id.* at 105.

¹⁵⁰ *Id.* at 33.

¹⁵¹ Post-Hearing Brief of the Bureau of Land Management at 4, *LeFevre v. BLM*, U.S. Department of Interior Office of Hearings and Appeals (Nov. 15, 2005).

¹⁵² *Id.*

¹⁵³ *Id.* at 36.

¹⁵⁴ *Id.* at 38.

¹⁵⁵ *Id.* at 40.

¹⁵⁶ *Id.* at 18.

consistency.¹⁵⁷ BLM Range Specialists testified that applicants must be U.S. citizens, be authorized to do business in Utah, and control base property, qualifications that the Monument's specialists determined were met by CGC.

In its argument before the ALJ, GCT described the appellants' case as a politically motivated attack on its program of "free-market conservation" including the "enhancement of public rangelands."¹⁵⁸ While GCT's earlier "Grazing Retirement Program" aimed to have public land management agencies cancel grazing permits in ecologically sensitive areas where it regarded grazing as inappropriate, GCT now claimed that the purpose of its program had evolved to "a broader rangelands program under which it purchases, preserves and participates in environmentally sustainable grazing operations."¹⁵⁹ It is this "range conservation program," along with BLM's grazing policies, that, according to GCT, the appellants seek to put on trial. Reiterating the legal arguments made by the BLM, GCT asserted that its grazing program and transactions "are fully consistent with the [TGA], BLM's grazing regulations, and applicable agency guidance and authority."¹⁶⁰

F. Judges Weigh In

ALJ Heffernan issued his ruling for DOI on January 26, 2006. Heffernan began by observing, "where BLM has issued a grazing decision employing its administrative discretion, an appellant bears the burden of proof to show by a preponderance of the evidence that BLM's decision was unreasonable or improper."¹⁶¹ After a discussion of the issues, he concluded that appellants failed to meet their burden of proof and affirmed BLM's grazing decisions, finding them to be "premised on a rational, factual and legal basis."¹⁶²

Appellants argued that GCT had voluntarily relinquished its grazing privileges on the allotments at issue and therefore could not lawfully be issued grazing permits. Judge Heffernan noted BLM regulations as set out in 43 C.F.R.1825.11: "Generally, BLM considers a relinquishment to be effective when it is received, along with any required fee, in the BLM office having jurisdiction over the lands being relinquished. However, the specific program regulations govern effectiveness of relinquishments."¹⁶³ He concluded that, "this provision does not bereft BLM of the discretion to treat relinquishments as conditional, where the underlying facts provide a reasonable basis therefore."¹⁶⁴ According to Heffernan, GCT and the Monument managers had a clear understanding that relinquishment of grazing privileges was contingent on the outcome of the land use

¹⁵⁷ *Id.* at 30-34.

¹⁵⁸ CGC Post-Hearing Brief, *supra* note 78, at 1.

¹⁵⁹ *Id.* at 4.

¹⁶⁰ *Id.* at 2.

¹⁶¹ Order at 23, *LeFevre v. BLM*, Department of Interior Office of Hearings and Appeals (Jan. 26, 2006) [hereinafter "*LeFevre Order*"].

¹⁶² *Id.* at 37.

¹⁶³ 43 C.F.R. § 1825.11 (2008).

¹⁶⁴ *LeFevre Order*, *supra* note 161, at 25.

planning process.¹⁶⁵ The outcome of the planning process—deferral of a grazing closure decision pending the outcome of the Monument-wide EIS—did not meet GCT’s conditions for relinquishment and the “offer” to relinquish was rescinded. According to Heffernan, GSENM’s managers were justified in determining that GCT’s relinquishments had been withdrawn.¹⁶⁶

Appellants also argued that the issuance of grazing permits was unlawful since GCT was not in the livestock business and had no intent to graze. BLM rejected these as mandatory qualifications for acquiring a grazing permit and Judge Heffernan concluded that BLM’s determination was a “reasonable application of the agency’s administrative discretion.”¹⁶⁷ Heffernan found no precedential case law, statutory provision, or regulatory provision that mandates a permit applicant to be in the livestock business with a manifest intent to graze.

In response to appellants’ argument that BLM issued grazing permits to GCT for “conservation purposes,” in violation of TGA and FLPMA Heffernan concluded that grazing regulations do require a permittee to “make substantial use” of the permitted AUMs.¹⁶⁸ However, GCT’s initial non-use of its permits was taken at the request of Monument managers due to on-going drought conditions. Subsequently, GCT acquired, branded, and grazed cattle on several allotments. Heffernan, therefore, rejected appellants’ complaint, concluding that GCT “clearly intends to continue grazing cattle in numbers that are reviewed, approved and adjudicated by BLM within its ongoing administrative discretion.”¹⁶⁹

Heffernan also rejected appellants’ argument that BLM illegally arrived at a pre-ordained outcome based on pre-decisional collusion with GCT. The ALJ pointed to testimony by GSENM Manager Hunsaker that a commitment was made to GCT regarding process and procedure and not outcome. According to Hunsaker, he was never instructed by DOI superiors to reach any specific decision.¹⁷⁰ In fact, the final decisions on the land use plan amendments did not cancel grazing on the allotments as GCT had preferred. These decisions, according to Heffernan were “independent and well-reasoned” and not improperly influenced.¹⁷¹

On March 16, 2006, the appellants filed a federal suit against DOI, BLM, and GSENM under the Administrative Procedure Act (APA).¹⁷² The ranchers, along with Kane and Garfield Counties (Plaintiffs) challenged the ALJ’s factual determination that GCT’s relinquishment of grazing privileges was conditional. They asserted that the ALJ erred as a matter of law in concluding that BLM regulations allow conditional relinquishments.¹⁷³ Plaintiffs also disputed the

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 32.

¹⁶⁸ *Id.* at 30. *See* 43 C.F.R. 4140.1(a)(2) (2008). *See also* Public Lands Council v. Babbitt, 154 F.3d 1160 (10th Cir. 1998).

¹⁶⁹ *LeFevre* Order, *supra* note 161, at 33.

¹⁷⁰ Hearing Transcript, *supra* note 90, at 973.

¹⁷¹ *LeFevre* Order, *supra* note 161, at 36-37.

¹⁷² 5 U.S.C. § 706 (2006); *Stewart v. Kempthorne*, 593 F.Supp.2d 1240 (D. Utah 2008).

¹⁷³ Opening Brief of Plaintiff Regarding Causes of Action Arising Under Administrative Procedures Act at 14-15, *Stewart v. Kempthorne*, 593 F.Supp.2d 1240 (D. Utah 2008). Kane and

conclusion that GCT/CGC was qualified to acquire a grazing permit.¹⁷⁴ On January 7, 2008, Judge Tena Campbell issued a ruling affirming the ALJ's decision *in toto*.¹⁷⁵ Under an APA challenge there is a presumption of validity for the agency action and the burden of proving deficiencies rests with the plaintiffs.¹⁷⁶ The Plaintiffs had to show that the findings of the ALJ were not supported by substantial evidence.¹⁷⁷ The Court also gave substantial deference to the agency's interpretation of statutes under which Congress has granted the agency decision-making discretion.¹⁷⁸ In this case, the District Court ruled that the ALJ's decisions regarding the legality of conditional grazing privilege relinquishment and the qualifications for acquiring grazing permits were made under permissible readings of the law and supported by substantial evidence.¹⁷⁹

IV. CONCLUSION: CONSERVATIONISTS AND COWS

In testimony during the DOI hearings on the Monument managers' grazing decisions, Executive Director Bill Hedden admitted that GCT's initial goal in purchasing grazing permits was not to go in to the livestock business but, instead, to retire grazing on environmentally sensitive public lands.¹⁸⁰ Hedden viewed GCT's effort as a free-market alternative to traditional conservation policies that rely on government mandates. Under this alternative approach, GCT and its financial supporters were willing buyers working with ranchers willing to sell grazing privileges at a mutually agreed upon price. In GCT's view, these were "win-win" transactions. GCT, with BLM's support, would facilitate a reduction or elimination of grazing in areas where the land was being degraded or users were in conflict. The permittees would give up a grazing permit but be compensated so that they could pay off debt or restructure their livestock business.

GCT's approach was developed initially in response to overtures from federal land managers at the Glen Canyon National Recreation Area. GCT saw an opportunity to further its conservation goals on the Colorado Plateau by compensating ranchers to remove cattle from these public lands. The establishment of GSENM in 1996 created new opportunities to pursue this approach as ranchers felt increasingly squeezed by conflict with recreational users and the potential for more restrictive grazing regulations. GCT was able to raise the funds necessary to compensate ranchers willing to sell their grazing privileges. The Monument's managers at BLM used their administrative discretion in grazing management to facilitate the process, which they saw as a viable approach to resolving land use

Garfield counties were dismissed from the case for lack of standing. A Utah Court then enjoined the counties from continuing to fund the litigation. *See Grand Canyon Trust and Canyonlands Grazing Corp. v. Kane County and Garfield County*, No. 060600098 (6th Dist. Ct. Utah 2005).

¹⁷⁴ *Id.* at 29.

¹⁷⁵ *Stewart*, 593 F.Supp.2d at 1244.

¹⁷⁶ *Id.* at 1246.

¹⁷⁷ *Id.* at 1247.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 1253.

¹⁸⁰ Hearing transcript, *supra* note 90, at 927.

conflicts. For GCT, working with ranching families to address these conflicts also gave them a deeper appreciation for the ranchers' plight and their commitment to the land. It was clear, however, that the process as it had developed in the 1990s was legally vulnerable, and GCT began to prepare to adjust its program.

The legal challenges brought in 2001 by local ranchers and government officials forced GCT to make the adjustment. Under legal and political pressure, Monument managers backtracked from the earlier retirement process and deferred a grazing cancellation decision until a comprehensive Monument grazing plan was completed. The retirement decision was made more difficult by DOI Solicitor Myers' opinion that grazing allotments could be closed to grazing only if the planning process removed them from grazing districts. As a consequence of these Monument management decisions, its earlier transactions now made GCT a holder of base property with grazing preferences and permits. This eventually led to the largest allotment in GSENM. Drought conditions initially allowed GCT to refrain from grazing at permitted levels, but GCT fairly quickly purchased or leased a minimal number of cattle and began grazing operations. They were now in the livestock business.

Hedden testified that the grazing experience contributed to a further evolution in the goals of GCT's program. According to Hedden, his close work with Robinson on the Clark Bench allotment,

made me understand that using some of these permits would not be a disaster, especially if we were in a position that when very bad times come back, we would be willing to take the financial hit to take all of our cows off so that we did not do that, that episodic damage. That is really the thing that harms these lands.¹⁸¹

In 2005, during the continued legal wrangling over its GSENM grazing permits, GCT, with the Conservation Fund, purchased Kane and Two Mile ranches for \$4.5 million. The ranches include approximately 1,000 acres of private land and federal and state grazing permits that cover 860,000 acres of BLM, USFS, and Arizona state lands, including a large part of the Kaibab National Forest adjacent to the North Rim of the Grand Canyon.¹⁸² GCT and the Conservation Fund created the North Rim Ranch LLC to hold title to both ranches, the permits, livestock, brands, facilities and other assets owned by the ranch, and will graze at least 800 head of cattle.¹⁸³ According to GCT, "we have purchased these ranches with the goal of partnering with the USFS and BLM to manage livestock grazing and to do

¹⁸¹ *Id.* at 1257.

¹⁸² CGC Post-Hearing Brief, *supra* note 78, at 26.

¹⁸³ Grand Canyon Trust, Kane and Two Mile Ranches Program, <http://www.grandcanyontrust.org/programs/kane/overview.php> (last visited June 13, 2007). See also Shaun McKinnon, *Forced to Let Cattle Graze, Environmentalists Attempt to Restore Land Near Grand Canyon*, THE ARIZONA REPUBLIC, January 8, 2006, available at <http://www.biologicaldiversity.org/news/media-archive/Forced%20to%20let%20cattle%20graze.pdf>.

our part to maintain and restore their ecological, cultural, and scenic values.”¹⁸⁴ Its ownership of Kane and Two Mile Ranches make GCT’s one of the largest ranching operations on the Colorado Plateau.

In early 2008, the long-promised GSENM grazing EIS still had not been released and GCT continued its grazing operations in the Monument.¹⁸⁵ GCT’s critics took some consolation in this. In a letter to Southern Utah News, Garfield and Kane County Commissioners claimed, “any use of those allotments will be because of the counties’ challenge to preserve grazing. Without county challenge the GSENM/Trust ‘buyout’ program would have resulted in additional grazing elimination.”¹⁸⁶ Representative Noel said of GCT, “We turned them from environmentalists into cowboys. I guess what they can do is get their cows and start losing money like the rest of us.”¹⁸⁷ For GCT, the turn from environmentalists to cowboys was surprising but satisfying, and provided an opportunity to reconcile both roles. According to Hedden, GCT’s is a different kind of ranching operation, aimed at improving the health of the range, not making money. For the managers of GSENM, the broad discretion granted in managing the Monument has embroiled them in the continuing political conflicts over management of the public’s lands.

¹⁸⁴ *Id.*

¹⁸⁵ Grand Staircase-Escalante Nat’l Monument, http://www.blm.gov/ut/st/en/fo/grand_staircase-escalante.html (last visited Jan. 22, 2009). The last posted update on the status of the EIS is July 2005. The January 2006 minutes of UT BLM’s Resource Advisory Committee meeting report that, “[t]he draft grazing EIS, necessary to renew grazing permits (among other things) should be out late winter/early spring.” See http://www.blm.gov/pgdata/etc/medialib/blm/ut/external_affairs/rac.Par.84976.File.dat/jan06.pdf.

¹⁸⁶ *Elected Officials Response to GSENM Manager*, SOUTHERN UTAH NEWS, October 8, 2003, available at www.sunews.net/backissuesold/www.sunews2003.homestead.com/20031008.html.

¹⁸⁷ Joe Bauman, *Grazing Permit a Threat?*, DESERET NEWS, January 31, 2006, available at deseretnews.com/dn/print/1,1442,635180424,00.html.