FEDERAL GRAZING LANDS AS "CONSERVATION LANDS" IN THE 30 BY 30 PROGRAM

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On January 28, 2021, President Joseph Biden issued Executive Order No. 14008 initiating the "30 by 30" program to "conserve" 30% of the nation's lands and waters by 2030.[1] The Administration proceeded to produce the "America the Beautiful" report in May 2021, which laid out some principles for the conservation effort but did little to clarify the standards defining "conservation" lands.[2]

A year after the Executive Order, the Administration has yet to supply a definition. Conservation lands could possibly include multiple use grazing lands managed by the Bureau of Land Management (BLM) and the U.S. Forest Service, raising questions about whether these lands are sufficiently protective of the environment to qualify as conservation lands.[3]

The 2021 report prompted responses from various parties interested in multiple use lands. A coalition of 55 hunting and fishing organizations, as well as the American Farm Bureau Federation, urged the Administration to include federal grazing lands in the conservation count.[4] Twenty-two Republican members of the U.S. Congress warned Secretary of the Interior Deb Haaland to not let the conservation effort affect existing grazing practices on multiple use lands for economic reasons.[5]

In September 2021, Nada Culver, the acting director of BLM, and Chris French, the deputy chief of the Forest Service's National Forest System (NFS), speaking at the annual Public Lands Council meeting, confirmed that they believe the nation's grazing lands "should [be] include[d]" in the 30 by 30 count.[6] BLM and the Forest Service currently lease hundreds of millions of acres for livestock grazing, and studies show that at least one-third of these lands are "failing land health standards."[7] But unless the Administration evaluates grazing lands under proper rangeland health standards to ensure the lands meet minimum standards, the Administration should not include grazing lands as conservation lands in the 30 by 30 program.

BLM defines "rangeland health" as the "[d]egree to which the integrity of the soil and the ecological processes of rangeland ecosystems are sustained."[8] According to the agency, proper rangeland health exists "when ecological processes are functioning properly to maintain the structure, organization and activity of the system over time."[9] The Forest Service, on the other hand, conducts rangeland suitability analyses in its land planning and determines the amount of land in proposed grazing areas that is suitable for grazing without invoking rangeland health standards.[10] Since neither BLM nor the Forest Service conduct proper rangeland assessments and evaluations, neither agency can accurately determine whether the majority of their lands meet current health standards.

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1. Exec. Order No. 14008, 86 Fed. Reg. 7619, 7627 (Feb. 1, 2021).
2. *See* U.S. Department of the Interior et al., Conserving and Restoring America the Beautiful 3 (2021), https://www.doi.gov/sites/doi.gov/files/report-conserving-and-restoring-america-the-beautiful-2021.pdf (establishing eight "Principles for a Locally Led Effort to Conserve and Restore America the Beautiful").
3. *See id*. at 15:

   > President Biden has recognized and honored the leadership role that . . . ranchers . . . already play in the conservation of the nation's lands . . . and has made clear that his administration will support voluntary stewardship efforts that are already underway . . . includ[ing] a clear recognition that maintaining ranching in the West—on both public lands and private lands—is essential to maintaining the health of wildlife, the prosperity of local economies, and an important and proud way of life.

4. American Sportfishing Association et al., Sporting Conservation Community Recommendations 15 (2021), https://aws.boone-crockett.org/s3fs-public/atoms/files/news_sporting-conservatiocommunity-recommendations.pdf; Letter from Zippy Duvall, President, American Farm Bureau Federation, to President Joseph R. Biden (Apr. 22, 2021), https://www.fb.org/files/Public_Lands.30X30_Letter_to_White_House.AFBFLTR.04.22.21.pdf ("Farmers and ranchers are seeking assurance that multiple-use management of federal lands as well as actively managed and working lands in state or private ownership will be recognized for their conservation and open space benefits.").
5. Letter from Bruce Westerman et al., Members of Congress, to Debra Haaland, Secretary, U.S. Department of the Interior (Apr. 14, 2021), https://republicans-naturalresources.house.gov/uploadedfiles/2021-04-14_westerman_et_al_to_haaland_doi_re_30_x_30_engagement_session.pdf ("[T]here are concerns that the 30 by 30 initiative will ignore the multiple use mandates of our federal lands . . . [G]razing [is] vital to ensuring we have healthier, more productive lands.").
6. Jennifer Yachnin, *Biden Officials: Grazing Lands Could Count for Conservation Goals*, E&E News (Sept. 28, 2021), https://www.eenews.net/articles/biden-officials-grazing-lands-should-count-for-conservation-goals/.
7. *Id.* (quoting Western Watersheds Project Deputy Director Greta Anderson).
8. BLM, U.S. Department of the Interior, BLM Manual: H-4180-1—Rangeland Health Standards I-7 (2001) [hereinafter BLM Manual].
9. *Id.*
10. 16 U.S.C. §1604(g)(2)(A) (emphasis added).

This Comment explores the rangeland health processes implemented by both agencies, revealing that neither agency consistently abides by these standards. Part I analyzes the meaning of "multiple use" and the nonimpairment standard,[11] required by the Multiple-Use Sustained-Yield Act (MUSYA),[12] the National Forest Management Act (NFMA),[13] and the Federal Land Policy and Management Act (FLPMA).[14] We think that the agencies have not often applied the nonimpairment standard and believe they should adhere to the statute. Part II discusses the incomplete rangeland health data that exists for BLM and Forest Service rangelands. Part III examines a potential model for rangeland health management that could qualify rangelands as conservation lands: the rangeland management strategy of the BLM field office in Dillon, Montana.

We conclude, in Part IV, that while many grazing lands likely do not qualify as conservation lands under the Biden Administration's 30 by 30 program, the inclusion of grazing lands may be possible if both agencies were to update and implement contemporary rangeland management and evaluation techniques and strategies that could satisfy the nonimpairment standard. Meeting that standard would certainly seem to qualify those public rangelands for 30 by 30 inclusion.

I. The Applicable Statutes

In this part, we examine the requirements of the multiple use public land management statutes: MUSYA, NFMA, and FLPMA. Although often characterized as authorizing virtually non-reviewable agency discretion in balancing conflicting multiple uses, the statutes actually impose a limit on agency discretion: the directive to avoid impairing the productivity of the land. The 30 by 30 program could and should revitalize nonimpairment by making a nonimpairment finding a prerequisite for eligibility as conservation lands included in the program.

A. *MUSYA*

MUSYA directs the Secretary of Agriculture to "develop and administer the renewable surface resources," such as outdoor recreation, range, timber, watershed, and wildlife and fish of the national forests, "for multiple use and sustained yield of the several products and services obtained therefrom . . . [and that] due consideration shall be given to the relative values of the various resources in particular areas."[15] The statute defines "multiple use" broadly, with terms like "that [which] will best meet the needs of the American people" and "making the most judicious use of the land"[16]; but also establishes a nonimpairment standard as a floor, concluding the directive with the phrase: "without impairment of the productivity of the land."[17]

The same nonimpairment language appears again in the definition of "sustained yield of the several products and services" that land management is to produce.[18] The statute thus indicates that nonimpairment is the overarching goal within which multiple use and sustained yield are to fit, as Prof. George Coggins has argued:

> The multiple use laws contain a series of "shalls" and "shall nots" that ought to be binding on public land managers. They demand an equality of resource treatment, and they forbid practices that detract from the future productivity of the land. They demand thought and foresight, and they prohibit economic optimization of single resources.[19]

The courts have avoided such a plain reading, however, and instead have emphasized Forest Service discretion.

A prominent example is the early case *Sierra Club v. Hardin*,[20] in which the Alaska district court found no MUSYA violation, despite a Forest Service plan to harvest 95% of the old growth timber in the Tongass National Forest.[21] The district court disagreed with an environmentalist claim that the plan violated MUSYA, on grounds that "Congress has given no indication as to the weight to be assigned each [multiple use] value[,] and it must be assumed that the decision as to the proper mix of uses within any particular area is left to the sound discretion and expertise of the Forest Service."[22]

The court did observe, however, that the Forest Service's discretion was not unlimited, reasoning that, "While the standards may be broad, they nevertheless are mandatory. The fact that the management of the national forests under these statutes inevitably involves a substantial amount of discretion in interpreting these directives does not preclude the possibility of review."[23] The court declined to reverse the Forest Service's choice to clearcut the forest without expressly considering the nonimpairment standard.

11. The nonimpairment standard originated in the National Park Service Organic Act of 1916, 16 U.S.C. §1. Prof. Robert Keiter has argued that the nonimpairment mandate offers heightened environmental protection to national park lands, despite judicial recognition that the National Park Service must also consider a statutory directive of accommodating public enjoyment. *See* Robert B. Keiter, To Conserve Unimpaired: The Evolution of the National Park Idea 37, 59, 76, 108, 265 (2013) (pointing to examples of courts upholding the Park Service's more environmentally protective regulations) (citing National Rifle Ass'n of Am. v. Potter, 628 F. Supp. 903, 909, 16 ELR 20356 (D.D.C. 1986); Fund for Animals v. Norton, 294 F. Supp. 2d 92, 105, 34 ELR 20010 (D.D.C. 2003); Bicycle Trails Council of Marin v. Babbitt, 82 F.3d 1445, 1453 (9th Cir. 1996); Mausolf v. Babbitt, 125 F.3d 661, 28 ELR 20057 (8th Cir. 1997); Greater Yellowstone Coal. v. Kempthorne, 577 F. Supp. 2d 183, 38 ELR 20244 (D.D.C. 2008); Southern Utah Wilderness All. v. National Park Serv., 387 F. Supp. 2d 1178 (D. Utah 2005)).
12. *See infra* note 15.
13. *See infra* note 29; 16 U.S.C. §§1600-1687, ELR Stat. NFMA §§2-16.
14. *See infra* note 37; 43 U.S.C. §§1701-1785, ELR Stat. FLPMA §§102-603.
15. MUSYA, 16 U.S.C. §§528, 529.
16. *Id.* §531(a).
17. *Id.*
18. *Id.* §531(b).
19. George C. Coggins, *Of Succotash Syndromes and Vacuous Platitudes: The Meaning of "Multiple Use, Sustained Yield" for Public Land Management*, 53 U. Colo. L. Rev. 229, 279 (1982).
20. 325 F. Supp. 99, 1 ELR 20161 (D. Alaska 1971).
21. *Id.* at 123.
22. *Id.*
23. *Id.* at 113.

The U.S. Court of Appeals for the Ninth Circuit affirmed, in an unreported decision in which it declared that multiple use management requires "due consideration," meaning "that the values in question must be informedly and rationally taken into balance," a "requirement [that] can hardly be satisfied by a showing of knowledge of the consequences and a decision to ignore them."[24] Thus, that court acknowledged the limitations of Forest Service multiple use discretion.

Later, in *National Wildlife Federation v. U.S. Forest Service*,[25] the Oregon district court followed *Hardin* and observed that "MUSYA is not entirely discretionary."[26] The court, however, declined to enjoin the Forest Service from clearcutting in an area with a history of landslides that threatened native fish, because the Forest Service had "adopted measures to protect and enhance fish habitats."[27] But the court also recognized that nonimpairment cabined agency discretion, and that the limit was judicially reviewable: "To some extent emphasis on one use will entail impairment of another use. It is the extent of this impairment that is determinative."[28] We think the 30 by 30 program should adopt this court's reasoning to ensure that multiple use management achieves MUSYA's statutory goals.

B. NFMA

NFMA reformed forest management practice while incorporating the multiple use directive into procedures for preparing land and resource management plans.[29] NFMA requires land plans to be consistent with MUSYA,[30] and to "insure research on and . . . evaluation of the effects of each management system to the end that it will not produce substantial and permanent impairment of the productivity of the land."[31] Other NFMA provisions also contain environmentally protective commands, similar to nonimpairment.[32]

NFMA also includes a directive that the Forest Service "provide for the diversity of the plant and animal communities," requiring the agency to regulate with "ecological integrity" at the forefront, as reflected in its 2012 planning rule.[33] The 2012 rule calls for forest plans to address "the effects of each management system to determine that they do not substantially and permanently impair the productivity of the land,"[34] and defines "multiple use" in the same terms as MUSYA,[35] stating that the multiple use directives must "meet the requirements" of both "sustainability" and "diversity of plant and animal communities."[36] NFMA and its implementing regulations clearly reflect the congressional expectation that nonimpairment is a fundamental element of multiple use management.

C. FLPMA

FLPMA contains similar multiple use and nonimpairment language, in directing BLM to manage public lands consistent with land use plans.[37] A FLPMA policy empha-

24. Sierra Club v. Butz, No. 71-2514, 3 ELR 20292 (9th Cir. Mar. 16, 1973).
25. 592 F. Supp. 931, 14 ELR 20349 (D. Or. 1984).
26. *Id*. at 938.
27. *Id*. at 938-39 (noting that the agency fulfilled its multiple use directive by "considering competing uses").
28. *Id*. n.15. In several other decisions, courts have interpreted "multiple use" as a standard giving the agency discretion to protect the environment. Perkins v. Bergland, 608 F.2d 803, 806, 10 ELR 20070 (9th Cir. 1979) ("[MUSYA's] language . . . breathes discretion at every pore") (internal quotation marks omitted) (upholding Forest Service's choice to reduce grazing permits because land had been damaged due to overgrazing); Ark Initiative v. Tidwell, 816 F.3d 119, 128, 46 ELR 20049 (D.C. Cir. 2016) ("There is no question that the [Forest] Service's decision to include in its [forest] management . . . some limited accommodation of recreational skiing together with . . . offsetting environmental protections is permissible under the multiple-use mandates . . . in [MUSYA]."); Wyoming v. Department of Agric., 661 F.3d 1209, 1235 (10th Cir. 2011) ("Under MUSYA's statutory scheme . . . Congress clearly authorized the Forest Service to regulate NFS lands for multiple uses . . . protected by the Roadless Rule, such as outdoor recreation, watershed, and wildlife and fish purposes.") (internal quotation marks omitted); Intermountain Forest Indus. Ass'n v. Lyng, 683 F. Supp. 1330, 1338, 18 ELR 21057 (D. Wyo. 1988) (rejecting argument that the Forest Service had to favor timber production) ("NFMA . . . provides that the Secretary *may* sell timber located on national forest land . . . [and] MUSYA . . . expressly directs that all uses be considered") (internal quotation marks omitted).
29. *See generally* NFMA, 16 U.S.C. §§1600-1614.
30. *See id*. §1604(e)(1) ("[the secretary shall] provide for multiple use and sustained yield of the products and services obtained therefrom in accordance with the Multiple-Use Sustained-Yield Act of 1960"); *id*. §1604(e)(2) ("[the secretary shall] determine forest management systems, harvesting levels, and procedures in the light of . . . the definition of the terms 'multiple use' and 'sustained yield' as provided in the Multiple-Use Sustained-Yield Act of 1960"); *id*. §1604(g) ("the Secretary shall . . . promulgate regulations, under the principles of the Multiple-Use Sustained-Yield Act of 1960"); *id*. §1604(g)(3)(D)(i) ("[the secretary shall] permit increases in harvest levels based on intensified management practices . . . if such practices justify increasing the harvests in accordance with the Multiple-Use Sustained-Yield Act of 1960").
31. *Id*. §1604(g)(3)(C) (emphasis added).
32. *See, e.g., id*. §1604(g)(3)(E) ("[S]oil, slope, or other watershed conditions will not be irreversibly damaged . . . . protection is provided for streams, streambanks, shorelines, lakes, wetlands, and other bodies of water from detrimental changes"); *see also id*. §1604(g)(3)(F)(v) (clearcuts must protect the "soil, watershed, fish, wildlife, recreation, and esthetic resources, and the regeneration of the timber resource").
33. *See* 36 C.F.R. §219.1(c) (2020) (laying out the ecological integrity standard:
> Plans will guide management of NFS lands so that they are ecologically sustainable . . . ; consist of ecosystems and watersheds with ecological integrity and diverse plant and animal communities . . . ; provide people and communities with ecosystem services and multiple uses that provide a range of . . . benefits for the present and into the future . . . includ[ing] clean air and water; habitat for fish, wildlife, and plant communities; and opportunities for recreational, spiritual, educational, and cultural benefits.

See also id. §219.19 (defining "ecological integrity" as "[t]he quality or condition of an ecosystem when its dominant ecological characteristics (for example, composition, structure, function, connectivity, and species composition and diversity) occur within the natural range of variation and can withstand and recover from most perturbations imposed by natural environmental dynamics or human influence"); Federal Forest Res. Coal. v. Vilsack, 100 F. Supp. 3d 21, 25, 45 ELR 20083 (D.D.C. 2015) (challenging ecological sustainability as the top-priority 2012 planning rule; note the case was dismissed on other grounds).
34. 36 C.F.R. §219.12 (2021) (emphasis added).
35. *Id*. §219.19; *see also* 16 U.S.C. §531(a).
36. 36 C.F.R. §219.10 (2021).
37. FLPMA, 43 U.S.C. §1732(a) ("[t]he Secretary shall manage the public lands *under principles of multiple use and sustained yield*") (emphasis added); *id*. §1702(c):
> [t]he term multiple use means . . . a combination of balanced and diverse resource uses that takes into account the long-term needs of future generations for renewable and nonrenewable resources, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and his-

sizes environmental protection,[38] implemented through directives such as "prevent[ing] unnecessary or undue degradation"[39] (UUD) and prioritizing and protecting "areas of critical environmental concern."[40] FLPMA also expressly authorizes BLM to "exclude[,] that is, totally eliminate[ ]" any of the "principal or major uses,"[41] including revocation of grazing permits.[42]

The legislative history of FLPMA reveals Congress intended that the Act require more environmental protection than its multiple use predecessors. The word "permanent" was added to proscribe "anything greater than minor alterations of a temporary nature,"[43] which could include overgrazing.[44] Further, FLPMA's "planning requirements bind [BLM] to a rational, coordinated management scheme and provide adequate bases for judicial review."[45] Professor Coggins observed that FLPMA differs from MUSYA by including an "emphasis on intergenerational equity, the clear directive to achieve long-term conservation, and the requirement of environmental nonimpairment."[46]

Coggins thought "the nonimpairment standard is clear, mandatory, and nondiscretionary,"[47] and that FLPMA "supplies the requisite law to apply"[48] for judicial review of the statute's substantive standards. In practice, however, as his leading casebook recognized, "courts [have] show[n] consistent reluctance to engage in substantive review of agency grazing level decisions at a landscape scale."[49] That failure should not inhibit the 30 by 30 effort from revitalizing FLPMA's nonimpairment mandate.

Prof. Joe Feller revealed that BLM makes its most important decisions regarding grazing on multiple use lands in annual operating instructions.[50] These decisions could include matters of practical importance; for example, the actual number of cattle that can graze on allotments or schedules for allotments to be grazed or rested.[51] The annual instructions enable BLM to exercise flexibility in determining optimal apportionment of rangelands, but in practice these decisions have led to overgrazing.[52]

However, in *National Wildlife Federation v. Bureau of Land Management*,[53] the Interior Board of Land Appeals (IBLA) concluded that BLM violated the multiple use mandate of FLPMA when it renewed grazing permits in southeastern Utah's Comb Wash canyonlands.[54] The IBLA reasoned that FLPMA obligated BLM to rationally balance competing values, and determined that BLM's renewal of grazing permits in sensitive riparian areas used for recreation failed to engage in "any reasoned or informed decision-making process concerning grazing in the canyons."[55] BLM had based the renewals on data solely related to grazing optimization.[56] But multiple use requires land managers to consider the relative values of various resources, including recreation, watershed, wildlife, and natural scenic, scientific, and historical values.[57] Despite the Comb Wash case, BLM's practice is to renew grazing permits without adequate consideration and evaluations of rangeland health.[58]

II. Current Evaluations of Rangeland Conditions

Although BLM and the Forest Service are responsible for evaluating and reporting rangeland health on a consistent basis, there is little accurate information available from the

torical values; and harmonious and coordinated management of the various resources *without permanent impairment of the productivity of the land and the quality of the environment*.

(emphasis added).

38. *Id.* §1701(a)(8):

    [I]t is the policy of the United States that . . . the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use . . . .

39. *Id.* §1732(b).
40. *Id.* §1712(c)(3).
41. *Id.* §1712(e)(2). Elimination of major uses of 100,000 acres or more must be reported to Congress. *Id.*; *see also id.* §1702(l) ("'principal or major uses' includes, and is limited to, domestic livestock grazing, fish and wildlife development and utilization, mineral exploration and production, rights-of-way, outdoor recreation, and timber production").
42. *See id.* §1752(b)(2). FLPMA directs BLM to manage wilderness study areas "so as not to impair the suitability of such areas for preservation as wilderness." *Id.* §1782(c).
43. *See* Roger Flynn, *Daybreak on the Land: The Coming of Age of the Federal Land Policy and Management Act of 1976*, 29 Vt. L. Rev. 815, 839 n.141 (2005) (citing H.R. Rep. No. 94-1163, at 44 (1976)) (internal quotation marks omitted).
44. *See infra* note 60.
45. George C. Coggins, *The Law of Public Rangeland Management IV: FLPMA, PRIA, and the Multiple Use Mandate*, 14 Env't L. 1, 49 (1983).
46. *Id.* at 50.
47. *Id.* at 59.
48. *Id.* at 74 (citing Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410, 1 ELR 20110 (1971)) (internal quotation marks omitted).
49. George C. Coggins et al., Federal Public Land and Resource Law 759 (7th ed. 2014); *see, e.g.*, Forest Guardians v. U.S. Forest Serv., 329 F.3d 1089, 1099-100 (9th Cir. 2003) (ignoring the multiple use mandate and giving no value to wildlife use: "even if we were to conclude that the [Forest] Service could develop a better system of predicting wild ungulate use, or even preventing overgrazing, we are not permitted to substitute our judgment for the agency's"); Western Watersheds Project v. Bureau of Land Mgmt., 971 F. Supp. 2d 957, 988 (E.D. Cal. 2013) (finding no FLPMA violation in renewing of grazing permits that could damage sensitive sage-grouse habitat); Natural Res. Def. Council, Inc. v. Hodel, 624 F. Supp. 1045, 1048, 16 ELR 20508 (D. Nev. 1985) ("While I may not personally approve of some of the actions taken by the BLM, (in the sense that if I were the 'rangemaster' I might as well have produced a different plan) I am powerless to substitute my judgment for that of the BLM in these matters."), *aff'd*, 819 F.2d 927 (9th Cir. 1987); Norton v. Southern Utah Wilderness All., 124 S. Ct. 2373, 2380, 34 ELR 20034 (2004) (holding that FLPMA's nonimpairment standard "is mandatory as to the object to be achieved, but it leaves the BLM a great deal of discretion in deciding how to achieve it"); *but see* Sierra Club v. Hodel, 848 F.2d 1068, 1075, 18 ELR 21237 (10th Cir. 1988) (holding that proposed improvements to a road crossing public lands violated FLPMA because the UUD standard provided "law to apply" and "impose[d] a definite standard on the BLM"); Western Watershed Project v. Salazar, 843 F. Supp. 2d 1105, 1131, 43 ELR 20243 (D. Idaho 2012) ("[t]o the extent livestock and sage grouse conflict, it is grazing that must yield").
50. Joseph M. Feller, *Grazing Management on the Public Lands: Opening the Process to Public Participation*, 26 Land & Water L. Rev. 569, 575-76 (1991).
51. *Id.*
52. *Id.*
53. 140 IBLA 85, 101 (1997).
54. *Id.*; 43 U.S.C. §1732(a).
55. *National Wildlife Fed'n*, 140 IBLA at 101.
56. *Id.* at 100.
57. 43 U.S.C. §1702(c).
58. *See infra* notes 85, 87 and accompanying text.

agencies on the current health status of rangelands.[59] Moreover, because they have not fully assessed the conditions of the rangelands, it is unlikely the agencies can accurately report their current health. Somewhat astonishingly, BLM has never assessed nearly 40% of BLM rangelands—totaling almost 59 million acres—for rangeland health.[60]

A. *BLM*

Annual BLM rangeland health data for its rangelands was once available to the public on BLM's website; now, however, BLM displays no information regarding rangeland health.[61] The most recent rangeland health report available is from 2018, which assessed BLM grazing allotments across 150 million acres in 13 western states.[62] The report found that of the 150 million acres assessed, 42% failed to meet the standards, with 70% of the reported failures due to livestock overgrazing.[63] Earlier, a BLM assessment from 2013 to 2015 announced that 40% of lands were substandard; again, more than 70% of the cause was livestock overgrazing.[64]

The figures from 2013 to 2018 displayed worsening conditions of rangeland health, despite the fact that the Fundamentals of Rangeland Health and Standards and Guidelines for Grazing Administration (Fundamentals)[65] require BLM field offices to "take appropriate action as soon as practicable but no later than the beginning of the next grazing year to bring grazing activities into conformance with grazing guidelines, or to modify them so that significant progress can be made toward achieving Land Health Standards."[66] BLM has admitted "no appropriate action has been taken to ensure significant progress toward meeting the standard."[67]

The rangelands that do allegedly meet rangeland health standards lack documentation as to how they were assessed and determined to have achieved rangeland health standards.[68] Since BLM's rangeland health methodology is not subject to independent review, BLM has exercised complete discretion in making its assessments and evaluations, with no outside fact-checking or corroboration.[69] Under these circumstances, it seems likely that the amount of rangelands not meeting rangeland health standards is actually higher than reported.[70] In a 2016 press release, Public Employees for Environmental Responsibility (PEER) Advocacy Director Kirsten Stade claimed that BLM's assessments have "obscure[ed]" the actual on-the-ground conditions of BLM rangelands.[71] Six years later, BLM has yet to provide any reliable data of the current conditions of most of its rangelands and likely is unaware of the actual conditions of the majority of them.[72]

In 2021, PEER conducted an independent analysis of more than 21,000 BLM grazing allotments, amounting to more than 156 million acres.[73] The analysis concluded that nearly half—almost 55 million acres—were not in compliance with BLM rangeland health standards, as prescribed in its regulations.[74] Of the rangelands in noncompliance, the analysis reported grazing as the "significant cause of failure" in 36%—some 40 million acres—of these rangelands.[75]

PEER acknowledged that these figures likely were underestimates because some of the studied grazing allotments failed to report a cause as to the reason for their failure, and livestock grazing is the most frequently cited cause of nonachievement on BLM rangelands.[76] PEER also recognized that it likely underestimated the amount of BLM rangelands failing to meet rangeland health standards because a considerable proportion of allotments yet to be assessed are located in regions where livestock failure rates are "remarkably high," such as in Nevada, where livestock failures exceed 50%.[77]

Without full knowledge of the health of their rangelands, BLM has continued to authorize grazing and reauthorize grazing permits without conducting any environmental analyses on grazing allotments. Grazing leases on BLM lands are generally issued for 10-year terms[78] and, upon renewal, require a National Environmental Policy Act (NEPA)[79] analysis in order to determine grazing allotments' land health status in comparison to the Fundamentals.[80] However, due to a backlog of NEPA analyses caused by inadequate BLM staffing, from 2004 to 2014 Congress permitted BLM to reauthorize grazing permits under the

59. *See infra* notes 61, 68, 89 and accompanying text.
60. Press Release, Public Employees for Environmental Responsibility, America's Rangelands Deeply Damaged by Overgrazing (Mar. 5, 2020), https://www.peer.org/americas-rangelands-deeply-damaged-by-overgrazing/.
61. *Id.*
62. *Id.*
63. *Id.*
64. Press Release, Public Employees for Environmental Responsibility, Livestock Land Abuse Rampant on Public Range (Oct. 6, 2016), https://www.peer.org/livestock-land-abuse-rampant-on-public-range/ (it is also important to note that these BLM reports initially omitted data on whether the agency was meeting rangeland health standards, but BLM restored this information following an administrative complaint by PEER).
65. See *infra* Appendix A, for a detailed description of what the Fundamentals require and how BLM suggests field offices ensure compliance with these regulations.
66. 43 C.F.R. §4180.2(c) (2020).
67. Press Release, *supra* note 64.
68. *Id.*; Interview with Josh Osher, Public Policy Director, Western Watersheds Project (Oct. 21, 2021).
69. Interview with Josh Osher, *supra* note 68; Press Release, *supra* note 64.
70. Press Release, *supra* note 64.
71. *Id.*
72. *See generally* Yachnin, *supra* note 6 (quoting Greta Anderson, Western Watersheds Project's deputy director: "The bureau and Forest Service actually have no idea what the land health status is on the majority of public lands allotments because they haven't ever looked, and where the bureau has looked, fully a third of bureau lands are failing land health standards because of livestock grazing").
73. *See* R.T. Fitch, *Decades of Overgrazing Compromise 30 x 30 Goal*, Straight From the Horse's Heart (Aug. 3, 2021), https://rtfitchauthor.com/2021/08/03/decades-of-overgrazing-compromise-30-x-30-goal/ (sourced originally from PEER).
74. *Id.*; 43 C.F.R. §4180.1 (2020).
75. *See* Fitch, *supra* note 73.
76. *Id.*
77. *Id.*
78. 43 C.F.R. §4130.2 (2020).
79. 42 U.S.C. §§4321-4370h, ELR Stat. NEPA §§2-209.
80. Western Watersheds Project, The Livestock Industry's Free Pass on Environmental Accountability (2019) (on file with author) [hereinafter The Livestock Industry's Free Pass].

original permit terms without conducting NEPA analyses and without improving livestock grazing practices.[81]

In 2014, Congress made this practice of renewing federal grazing permits without NEPA analyses permanent.[82] But BLM is not completely relieved of NEPA responsibilities in renewing current grazing permits.[83] Congress instead stated BLM may renew grazing permits "pending processing" with NEPA.[84] Nevertheless, most BLM field offices reported in 2019 that large percentages of their grazing allotments have not received a new environmental analysis at all.[85]

Meanwhile, the amount of grazing permit renewals has increased substantially, with automatic renewal rates of grazing allotments increasing from 31.6% in 2013 to 52.7% in 2018.[86] Today, most BLM field offices rubberstamp an increasing number of grazing permit renewals with no new conditions, rangeland health evaluations, or environmental analyses.[87] Thus, BLM authorizes continued grazing without any current information on the health of these rangelands or the amount of environmental damage caused by permitted grazing.

B. *The Forest Service*

Because there are no Forest Service grazing and rangeland health regulations in place,[88] holding the Forest Service accountable for management practices involving livestock grazing and rangeland health is difficult. Typically, the Forest Service renews grazing permits on its lands without conducting a NEPA analysis, relying on the same FLPMA amendment that allows BLM to renew permits under the same conditions pending a NEPA analysis.[89] Thus, beyond a land-plan determination that the land is suitable for grazing, the health of Forest Service rangelands remains unclear. Yet, the Forest Service continues to issue and renew grazing permits on its lands without considering rangeland health or the environmental effects of continued grazing.

The Colville National Forest in Washington State exemplifies the lack of evaluation of rangeland health. In May 2021, the Forest Service issued grazing permits for two different allotments in the Colville National Forest.[90] The most recent forest plan developed for this national forest was completed in 2019, with suitability determinations finding only 31% of the land within current cattle grazing allotments actually capable and suitable for cattle grazing.[91] Nonetheless, the Forest Service stated it would not change grazing management in the area until the agency conducted site-specific NEPA analyses.[92]

But the agency has not conducted any NEPA analyses on these allotments in nearly a decade, and the forest plan ultimately permitted the same number of livestock to graze the same allotments at the same intensity.[93] The land itself is in poor shape, as Timothy Coleman, director of the Kettle Range Conservation Group, stated: "Grasses and shrubs are grazed down to bare dirt, waterways reek of cow manure, hiking trails and wetlands are trashed."[94] Moreover, the permitted grazing allotments are within the Endangered Species Act (ESA)-protected bull trout's critical habitat,[95] where, according to the U.S. Department of Agriculture, the species' populations are at a "high risk of extinction."[96]

The Secretary of Agriculture's 2020 memorandum directing the Forest Service "to honor our nation's grazing heritage" is likely to encourage the Forest Service to continue issuing grazing permits like the ones issued in Colville National Forest—permits that lack any meaningful environmental review or NEPA analysis.[97] The 2020 memorandum promised not only that the Forest Service would "establish in forest plans that grazing and support for grazing . . . is essential for their management," but that the Forest Service would also "streamline renewal of range permits and range improvements on the National Forests and Grasslands."[98] This guidance reflected what continues to occur throughout the nation's national forests: increased grazing permits on an annual basis.[99]

Local BLM and Forest Service managers have incentives to issue and renew grazing permits without adequate environmental analyses, due to potential funding losses and fear of local retaliation.[100] By prioritizing grazing and

81. *Id.*
82. 43 U.S.C. §1752(c)(2), as amended by Pub. L. No. 113-291 (2014).
83. The Livestock Industry's Free Pass, *supra* note 80.
84. *Id.*
85. *See*, *e.g.*, *id.* (Arizona reported that BLM renewed 82.7% of grazing allotments without a NEPA analysis, while Oregon reported 71.5%; Nevada 78.6%; and Idaho 73.4%).
86. The Livestock Industry's Free Pass, *supra* note 80.
87. Interview with Josh Osher, *supra* note 68.
88. See *infra* Appendix B, for descriptions of the Forest Service's guidance documents on grazing and rangeland health.
89. *Id.*; 43 U.S.C. §1752(c)(2).
90. Press Release, Western Watersheds Project, Grazing Permits on Colville National Forest Threaten Imperiled Bull Trout (July 19, 2021), https://westernwatersheds.org/2021/07/grazing-permits-on-colville-national-forest-threaten-imperiled-bull-trout/.
91. Mateusz Perkowski, *Environmentalists Seek Grazing Injunction in National Forest*, Cap. Press (Sept. 18, 2020), https://www.capitalpress.com/state/washington/environmentalists-seek-grazing-injunction-in-national-forest/article_f0b53608-f9e4-11ea-992c-3fc678d6928c.html.
92. *Id.*
93. *Id.*; Interview with Josh Osher, *supra* note 68.
94. Press Release, Western Watersheds Project, *supra* note 90.
95. *Id.*; 16 U.S.C. §§1531-1544, ELR Stat. ESA §§2-18.
96. Natural Resources Conservation Service Montana, *Threatened and Endangered Species: Bull Trout*, https://www.nrcs.usda.gov/wps/portal/nrcs/mt/newsroom/factsheets/nrcs144p2_057914/ (last visited Feb. 13, 2022).
97. Casey Johnson, *Honoring the History and Value of Grazing on the National Forests and Grasslands*, U.S. Forest Serv. (Aug. 7, 2020), https://www.fs.usda.gov/features/honoring-history-and-value-grazing-national-forests-and-grasslands.
98. Memorandum from Sonny Perdue, Secretary, U.S. Department of Agriculture, to Victoria Christiansen, Chief, Forest Service (June 12, 2020).
99. *See*, *e.g.*, U.S. Forest Service, U.S. Department of Agriculture, Grazing Statistical Summary: FY 2016, at 1 (2017) (in 2016, there were 5,863 livestock grazing permits existing in the NFS); Press Release, U.S. Forest Service, 2020 Forest Service Grazing Announced (Jan. 31, 2020), https://www.fs.usda.gov/news/releases/2020-forest-service-grazing-announced (as of January 31, 2020, 6,250 permits were administered by the Forest Service, a 6% increase).
100. Interview with Josh Osher, *supra* note 68; *see*, *e.g.*, Brianna Smith, *U.S. Forest Service Hit With Lawsuit Over Cattle Grazing Permits*, Legal Reader (Dec. 2, 2019), https://www.legalreader.com/u-s-forest-service-hit-with-lawsuit-over-cattle-grazing-permits/ (discussing a recent lawsuit by the Western Watersheds Project, which claims the Forest Service is permitting

streamlining grazing permit renewals—coupled with local pressure—the Forest Service is unlikely to begin to meaningfully consider suitability determinations or conduct NEPA analyses on its rangelands in the absence of legal directives to do so. Consequently, the public has no accurate estimate of the health of national forest rangelands. The 30 by 30 program could reverse these pervasive agency incentives to overlook rangeland health.

III. An Example for the Future: The Dillon Field Office

Although the trend in BLM field offices is to disregard the required rangeland health standards and guidelines prescribed by the BLM Fundamentals in promulgating their own regional standards and guidelines,[101] the BLM Dillon Field Office (DFO) may provide a model for other BLM field offices.[102] DFO manages more than 900,000 acres of public lands in southwestern Montana. In 2002, in preparation of a revised resource land plan, BLM began assessing rangeland health in accordance with the BLM federal standards and the BLM Manual—a practice it continues to this day.[103] Through its watershed assessment program, DFO has been able to efficiently assess and improve rangeland health on more of its lands than in the past.[104]

DFO's process involves dividing the lands into watersheds, with two watersheds assessed per year on a 10-year cycle, coinciding with the 10-year terms of grazing permits.[105] Through its watershed assessment process, DFO can efficiently assess and accurately report on the current health status of its rangelands; the agency also posts online copies of its watershed assessments, NEPA documents, and proposed and final decisions for each watershed.[106] Thus, not only is the current rangeland health status of DFO's rangelands publicly available, but also the agency's efforts to maintain or improve its rangeland conditions to achieve conformance with both the state and federal rangeland health standards.[107]

For example, the 2018 East Bench Watershed (EBW) Assessment found seven of the 17 grazing allotments were not meeting one or more of the rangeland health standards.[108] The interdisciplinary team (IDT) determined livestock grazing to be the determinative factor on one of the grazing allotments (the Hoffman allotment), causing the allotment to not meet the riparian standard.[109] Consequently, although BLM renewed the Hoffman allotment grazing permit, the agency removed from its permit a wetland in poor riparian health due to grazing, requiring fencing to exclude livestock from the area.[110]

The DFO watershed assessment process serves as an example for other BLM field offices to follow in accurately evaluating and improving rangeland health conditions. If all BLM field offices implemented similar strategies to assess their rangelands, the agency could accurately report the health conditions of its 155 million acres of rangelands, and thus determine whether its rangelands may qualify as conservation lands under the 30 by 30 program.[111] The designation of grazing lands as conservation lands appropriate for inclusion in the 30 by 30 program would be possible if both BLM and the Forest Service

illegal grazing in Utah's Fishlake National Forest; the lawsuit describes incidences where local threats, including a threatened arrest of the local ranger supervisor, have influenced grazing permit decisions).

In 2013, the Forest Service issued ranchers with grazing allotments in the Fishlake National Forest notices of noncompliance for forage overutilization, further livestock use after the permitted date, and failure to follow pasture rotation schedules outlined in the permits. Following these notices, the Forest Service cited "safety concerns and verbal threats" from the ranchers. In 2014, the Forest Service then permitted the allotments to be managed through deferred-rotation instead of rest-rotation, even though this action was not evaluated, nor authorized, by NEPA. Permit violations continued to occur, including the failure to maintain rangeland improvements, and in 2019, the local forest supervisor met with the ranchers, where Forest Service records describe ranchers becoming angry and issuing additional threats. Following this occurrence, the ranchers stated they would be releasing cattle onto grazing allotments regardless of permit status, to which the Forest Service responded by issuing the permittees temporary grazing permits. *See* Anna Miller, *Utah Forest Service Sued for Cattle Grazing Permits*, W. Livestock J. (Mar. 27, 2020), https://www.wlj.net/top_headlines/utah-forest-service-sued-for-cattle-grazing-permits/article_1b5c030a-115b-11ea-a449-d75e68507fe7.html

101. *See supra* notes 61-72 and accompanying text.
102. Ryan Martin et al., An Interdisciplinary Approach for Watershed-Scale Assessment and Management 25 (2012) (noting the reluctance of BLM field offices to follow the 4180 Fundamentals and subsequently issued BLM Manual).
103. *Id.* at 25-26; see *infra* Appendix C, for details on the DFO's watershed assessment program.
104. Prior to the program's implementation, DFO completed 20 grazing permits/lease renewals, 9 administrative determinations, and 72 environmental assessments (EAs) over an eight-year period (from 1995 to 2002). Subsequently, using its watershed program over an eight-year period (from 2003 to 2010), DFO analyzed and completed more than 300 grazing permits/renewals; allotment management plan revisions on 42% of its allotments; 86 new water developments and 70 water developments rebuilt or abandoned; 97 new spring/riparian enclosures or riparian pastures; 63 new division or boundary fences; 44 fences removed or modified to reduce wildlife collision/entanglement hazards; six new wildlife guzzlers and five new fish barriers (for managing native trout); 28,000 acres of prescribed burns to restore sagebrush habitat and aspen or improve suppression efforts and safety in the wildland/urban interface; more than 9,000 acres of timber/salvage harvest to improve forest health and resiliency; white bark pine restoration, management, and protection projects; 29 miles of riparian-conifer removal to enhance deep-rooted woody riparian species; more than 4,000 acres of mowing, seeding, and mechanical treatments to meet various land health and habitat objectives; and alterations of 20 miles of road designations to improve public access and mitigate resource concerns. Martin et al., *supra* note 102, at 29.
105. *Id.* at 26.
106. *See* BLM, *BLM National NEPA Register*, https://eplanning.blm.gov/eplanning-ui/home (last visited Feb. 13, 2022) (providing all reports and decisions for DFO watersheds).
107. *Id.*
108. DFO, BLM, East Bench Watershed Environmental Assessment 7 (2019) (DOI-BLM-MT-B050-2019-0008-EA), https://eplanning.blm.gov/public_projects/nepa/118516/174958/212511/FINAL-2019_East_Bench_Watershed_EA.pdf [hereinafter East Bench Watershed EA]. For the full EBW Assessment Report, see DFO, BLM, East Bench Watershed Assessment Report (2018), https://eplanning.blm.gov/public_projects/nepa/118516/164401/200538/East_Bench_Watershed_Assessment_Report.pdf.
109. DFO, BLM, Notice of Final Decision & Decision Record for the East Bench Watershed Environmental Assessment 2 (2019), https://eplanning.blm.gov/public_projects/nepa/118516/20009868/250011550/EBW-Final_Decision-signed_with_Appendicies_A&B_-Eplanning.pdf [hereinafter East Bench Watershed ROD]; *see also* East Bench Watershed EA, *supra* note 108, at 16.
110. East Bench Watershed ROD, *supra* note 109, at 21.
111. BLM, *Livestock Grazing on Public Lands*, https://www.blm.gov/programs/natural-resources/rangelands-and-grazing/livestock-grazing (last visited Feb. 13, 2022).

followed proper rangeland management and evaluation techniques and strategies.

IV. Conclusion

Congress established the nonimpairment mandate as part of its multiple use statutes. Consequently, BLM and the Forest Service should be managing their rangelands in a manner that avoids impairment of the health of the lands. Nonimpairment could and should become the vehicle by which to achieve rangeland health standards, and thus for rangelands to become eligible for inclusion as conservation lands in the 30 by 30 program.

But without sufficient knowledge regarding the current health of BLM and Forest Service rangelands, federal grazing lands should not be included wholesale in the 30 by 30 program. Neither BLM nor the Forest Service can, at present, accurately attest to the current health status of their rangelands because both agencies have failed to conduct recent adequate assessments of their rangelands.[112] Current data regarding the health of federal rangelands suggest that these unassessed lands likely do not meet rangeland health standards and are not suitable for continued grazing.[113] Despite evidence of poor rangeland health and a lack of current rangeland health assessments, both agencies have continued to renew and issue grazing permits on their rangelands, enabling degradation of rangelands to continue without any evaluation, protection, or mitigation.[114] The result is arguably a violation of the statutory nonimpairment requirements.

Both BLM and the Forest Service have regulations and guidance documents available concerning how to properly assess their rangelands' health to determine if their rangelands are meeting rangeland health standards[115] or are suitable for grazing.[116] The DFO's watershed assessment program gives other BLM field offices a comprehensive example of how to properly assess rangeland health and improve rangeland health conditions.[117] Until both agencies evaluate their rangelands and conclude they meet proper rangeland health standards, federal grazing lands should not be included as conservation lands in the 30 by 30 program.

Addendum

In March 2022, while this Comment was in press, Public Employees for Environmental Responsibility (PEER) released a study, based on data from 1997 to 2019, finding that half of the assessed BLM lands fail to meet the agency's rangeland health standards. Some 72% of the failing lands are due to overgrazing, about 40 million acres. Since BLM has not assessed many millions of acres, no doubt the number of failing grazing lands is considerably higher. Many of these lands include greater sage-grouse breeding areas and habitat. The lands in the worst condition were in Nevada (83% failing) and Idaho (78% failing). PEER also released an interactive map enabling the public to know which lands do not satisfy the standards (which many think are not adequate to protect rangeland health even if they were met).[118]

Appendix A—BLM Rangeland Health Standards

BLM developed its Fundamentals in the 1990s, with assistance from citizen-based resource advisory councils (RACs) throughout the West.[119] The purpose of the Fundamentals is to provide a universal measure for BLM, public land users, and the public to determine rangeland health, as well as to suggest methods to improve rangeland health.[120] The Fundamentals are divided into two parts: (1) standards[121] and (2) guidelines.[122] The standards establish a baseline of "acceptable resource conditions," focusing on current and desired resource conditions; the guidelines provide techniques for managing activities "to achieve those desired conditions."[123] The Fundamentals provide the federal "floor" of requirements for rangeland health and management, supplemented by state and regional standards and guidelines that BLM offices tailor to the specific ecosystems and needs of their areas.

A. The Standards

The standards establish the agency's policy of managing for healthy rangelands,[124] creating the four fundamentals of rangeland health: (1) upland health, (2) riparian health, (3) water quality, and (4) biodiversity.[125] The standards require any standards or guidelines created or revised by a

112. *See supra* notes 61-72, 88-98 and accompanying text (discussing the lack of adequate environmental evaluations on BLM and Forest Service rangelands).
113. *Id.*
114. *See supra* notes 78, 80-87, 97-100 and accompanying text (discussing the agencies' practices of issuing and renewing grazing permits despite evidence of poor rangeland health, or, in the alternative, lack of data regarding rangeland health).
115. See *infra* Appendix A, for BLM's Fundamentals.
116. See *infra* Appendix B, for Forest Service handbooks on assessing rangeland health for NEPA compliance and suitability determinations.
117. *See supra* notes 101-11 (detailing the success of the DFO's watershed assessment program); *see also* Appendix C (describing the DFO watershed assessment program's format and implementation).
118. *See* Kylie Mohr, *There Are Millions of Acres of "Failing" Rangelands, Data Shows*, High Country News (Mar. 14, 2022); Scott Streater, *Watchdog Reports 54M Acres of BLM Rangeland Fails Health Standards*, E&E News PM (Mar. 14, 2022). The interative map is available at https://mangomap.com/peer/mapps/126421/blm-rangeland-health-status-2020-the-significance-of-livestock-grazing-on-public-lands?preview-true.
119. BLM, *Rangeland Health*, https://www.blm.gov/programs/natural-resources/rangelands-and-grazing/rangeland-health (last visited Feb. 13, 2022); 43 C.F.R. §4180 (2020).
120. BLM Manual, *supra* note 8, at I-1.
121. 43 C.F.R. §4180.1 (2020).
122. *Id.* §4180.2.
123. BLM Manual, *supra* note 8, at I-1.
124. 60 Fed. Reg. 9894, 9954 (Feb. 22, 1995).
125. BLM Manual, *supra* note 8, at I-1; 43 C.F.R. §4180.1 (2020).

BLM state director to incorporate these four federal fundamentals.[126] To maintain consistency, in relation to upland health, watersheds must have achieved, or be making significant progress toward achieving, "proper-functioning physical condition," as well as soil, plant, and water conditions supporting necessary ecological functions.[127]

The riparian health fundamental requires maintenance of ecological processes "support[ing] healthy biotic populations and communities," or significant progress to be made toward the achievement of that goal.[128] The Fundamentals also require compliance with state water quality standards and the achievement, or significant progress toward achievement, of BLM's management objectives.[129] To meet the biodiversity fundamental, habitats must be, or be making significant progress toward being, "restored or maintained" for both federally listed and candidate threatened and endangered species, as well as any "other special status species."[130]

The standards serve as a baseline for BLM field offices to maintain compliance with applicable environmental statutes and "healthy sustainable rangelands" when developing land management plans and authorizing grazing-related activities.[131] In establishing the Fundamentals, the agency intended to create national standards for "appropriate grazing practices to help ensure productive rangelands."[132] The standards apply to all states and regions as the baseline expectations, supplemented with BLM field offices' more specific state and local guidelines addressing the geographic needs of each region.[133]

B. The Guidelines

The guidelines provide the underlying principles for the development of state and regional standards and guidelines, establishing the framework for BLM field offices to follow.[134] First, the BLM state director must consult with the applicable RACs in order to determine the geographical area the state standards and guidelines will pertain to, and to identify any area that is "unique, and . . . [cannot] be adequately protected using standards and guidelines developed on a broader geographical scale."[135] In developing and amending state or regional standards and guidelines, the BLM state director must coordinate with applicable RACs, tribes, other state and federal land management agencies, and the public.[136] Once developed, the state director submits the standards and guidelines to the Secretary of the Interior for approval; once approved and implemented, the state director may, with the approval of the Secretary, modify the standards and guidelines "to address local ecosystems and management practices."[137]

In developing state and regional standards and guidelines, a BLM field office may form an IDT, comprising members with various ecological knowledge and expertise, to complete the consultation and development process.[138] The IDT consults with the RACs, tribes, federal and state land management agencies, and the public, and develops the standards and guidelines.[139] At a minimum, state and regional standards must address "(1) [w]atershed function; (2) [n]utrient cycling and energy flow; (3) [w]ater quality; (4) [h]abitat for endangered, threatened, proposed, candidate, and other special status species; and (5) [h]abitat quality for native plant and animal populations and communities."[140]

State and regional guidelines must address the following 12 principles[141]: (1) vegetative ground cover[142]; (2) subsurface soil conditions and permeability[143]; (3) riparian-wetland functions[144]; (4) stream channel morphology[145]; (5) soil organisms, plants, and animals[146]; (6) seeding establishment of appropriate plant species[147]; (7) water quality[148]; (8) federally listed species' habitats[149]; (9) federally proposed, candidate, or other special status species' habitats[150];

126. 43 C.F.R. §4180.1 (2020).
127. *Id.* §4180.1(a):
> Watersheds are in, or are making significant progress toward, properly functioning physical condition, including their upland, riparian-wetland, and aquatic components; soil and plant conditions support infiltration, soil moisture storage, and the release of water that are in balance with climate and landform and maintain or improve water quality, water quantity, and timing and duration of flow.

128. *Id.* §4180.1(b) (ecological processes include "the hydrologic cycle, nutrient cycle, and energy flow").
129. *Id.* §4180.1(c) (listing "meeting wildlife needs" as an example of established BLM management objectives).
130. *Id.* §4180.1(d).
131. 60 Fed. Reg. at 9954 (noting the intent to maintain consistency with statutes like FLPMA, the Taylor Grazing Act, the Clean Water Act, and the ESA).
132. *Id.*
133. *Id.*
134. *Id.*; 43 C.F.R. §4180.2 (2020).
135. 43 C.F.R. §4180.2(a) (2020).
136. *Id.* §4180.2(b).
137. *Id.*
138. BLM Manual, *supra* note 8, at II-1, II-2 (The IDT will have knowledge and skills in the areas of "vegetation, soils, water quality, riparian, wildlife, ecology, fire management, and hydrology." Staff may include any combination of the following: "Range Management Specialist, Soil Scientist, Wildlife Biologist, Hydrologist, Fisheries Biologist, Botanist, Fire Ecologist, Geologist, or Cultural Resource Specialist as long as the needed skills and knowledge are represented.").
139. *Id.*
140. 43 C.F.R. §4180.2(d) (2020) (emphasis added).
141. *Id.* §4180.2(e) (emphasis added).
142. *Id.* §4180.2(e)(1) ("Maintaining or promoting adequate amounts of vegetative ground cover, including standing plant material and litter, to support infiltration, maintain soil moisture storage, and stabilize soils . . . .").
143. *Id.* §4180.2(e)(2) ("Maintaining or promoting subsurface soil conditions that support permeability rates appropriate to climate and soils . . . .").
144. *Id.* §4180.2(e)(3) ("Maintaining, improving or restoring riparian-wetland functions including energy dissipation, sediment capture, groundwater recharge, and stream bank stability . . . .").
145. *Id.* §4180.2(e)(4) ("Maintaining or promoting stream channel morphology (e.g., gradient, width/depth ratio, channel roughness and sinuosity) and functions appropriate to climate and landform . . . .").
146. *Id.* §4180.2(e)(5) ("Maintaining or promoting the appropriate kinds and amounts of soil organisms, plants and animals to support the hydrologic cycle, nutrient cycle, and energy flow . . . .").
147. *Id.* §4180.2(e)(6) ("Promoting the opportunity for seedling establishment of appropriate plant species when climatic conditions and space allow . . . .").
148. *Id.* §4180.2(e)(7) ("Maintaining, restoring or enhancing water quality to meet management objectives, such as meeting wildlife needs . . . .").
149. *Id.* §4180.2(e)(8) ("Restoring, maintaining or enhancing habitats to assist in the recovery of Federal threatened and endangered species . . . .").
150. *Id.* §4180.2(e)(9) ("Restoring, maintaining or enhancing habitats of Federal proposed, Federal candidate, and other special status species to promote their conservation . . . .").

(10) native species' physical and biological conditions[151]; (11) native species[152]; and (12) incorporation of non-native plant species.[153]

Following the development of the Fundamentals in 1995, BLM field offices were to develop and effectuate state and regional standards and guidelines by August 1997.[154] If field offices failed to develop standards and guidelines by this date, "fallback" standards and guidelines established within the Fundamentals were to be implemented "[u]ntil such time as state or regional standards and guidelines are developed and in effect."[155] The fallback standards and guidelines are more general in their requirements,[156] but contain specific provisions for improving livestock and grazing practices.[157]

C. *Assessments and Evaluations*

The Fundamentals require BLM field offices to conduct land health standards evaluations to determine whether livestock grazing practices are degrading rangeland health, and, if so, to take corrective action.[158] To begin, BLM field offices must conduct an assessment, which BLM defines as "[t]he estimation or judgement of the status of ecosystem structures, functions, or processes, within a specified geographic area (preferably a watershed or a group of contiguous watersheds) at a specific time."[159] The BLM Manual states assessments "should be conducted by interdisciplinary teams of journey-level specialists that adequately represent the resources involved," and the methodology used in assessing resource conditions may range from a new examination of existing information to collecting new data in the field.[160]

In the assessment, a BLM field office "should" provide a summary of the data and information collected, with professional judgments of team members and clear documentation of sources.[161] Information in the assessment "should be" extensive and may include a range of information, such as quantitative data from monitoring and inventories, qualitative information, professional knowledge, and knowledge provided by state agencies, public land users, and others.[162] The purpose of the assessment stage is to characterize resource conditions' statuses so BLM can compare the resource conditions' statuses to land health standards during the evaluation stage.[163]

Once the assessment stage is complete, BLM field offices evaluate the data collected in terms of the federal and state rangeland health standards and guidelines "to identify cause-effect relationships and draw conclusions about whether or not each standard is being met for the evaluation area as a whole."[164] The evaluation report should, at a minimum, include the location identifier of the data collection site, the date assessed, and a column for each health standard to indicate whether or not the location is achieving applicable standards.[165] Where quantitative data are unavailable, any conclusion based on "professional judgement" "needs to be clearly documented."[166]

If an assessment "indicates a rangeland is failing to achieve standards or that management practices do not conform to guidelines," the authorized officer will use the assessment data during the evaluation to identify significant factors contributing to the failure or nonconformity.[167] If, during such evaluation, the officer determines that existing grazing management practices or levels of grazing use are significant factors in degrading rangeland health, the officer must create a "determination document" and "formulate, propose, and analyze appropriate action to address the failure to meet standards or to conform to the guidelines."[168]

The determination document, at a minimum, must include a statement of achievement or nonachievement for each standard, a list of causal factors for not achieving the standards, and a statement of conformance or nonconformance with the guidelines.[169] The IDT must answer the following questions concerning grazing within the documentation document:

> 1. Is it more likely than not that existing grazing management practices or levels of grazing use are significant factors in failing to achieve the Standards or conform with the guidelines? (YES/NO)
>
> 2. Is it more likely than not that existing grazing management needs to be modified to ensure that the Fundamentals of rangeland health are met, or making significant progress toward being met? (YES/NO)[170]

151. *Id.* §4180.2(e)(10) ("Maintaining or promoting the physical and biological conditions to sustain native populations and communities . . . .").
152. *Id.* §4180.2(e)(11) ("Emphasizing native species in the support of ecological function . . . .").
153. *Id.* §4180.2(e)(12) ("Incorporating the use of non-native plant species only in those situations in which native species are not available in sufficient quantities or are incapable of maintaining or achieving properly functioning conditions and biological health.").
154. BLM Manual, *supra* note 8, at II-1, II-3.
155. 60 Fed. Reg. at 9955; 43 C.F.R. §4180.2(f) (2020).
156. 60 Fed. Reg. at 9955.
157. *See, e.g.*, 43 C.F.R. §4180.2(f)(2)(xii) (2020) ("Continuous, season-long livestock use is allowed to occur only when it has been demonstrated to be consistent with achieving healthy, properly functioning ecosystems . . . ."); *see also id.* §4180.2(f)(2)(xv):
> Grazing on designated ephemeral (annual and perennial) rangeland is allowed to occur only if reliable estimates of production have been made, an identified level of annual growth or residue to remain on site at the end of the grazing season has been established, and adverse effects on perennial species are avoided.
158. *Id.* §4180.2(c).
159. BLM Manual, *supra* note 8, at I-2.
160. *Id.* at III-9.
161. *Id.* at III-10.
162. *Id.*
163. *Id.* at I-2.
164. *Id.* at III-10.
165. *Id.* at III-1; *see also id.* at Illustration 1-1 (a provided evaluation adequacy checklist for field offices to use to insure "minimum levels of quality and consistency are met").
166. *Id.* at III-12.
167. 43 C.F.R. §4180.2(c) (2020).
168. *Id.*; BLM Manual, *supra* note 8, at III-13.
169. BLM Manual, *supra* note 8, at III-13.
170. *Id.* at III-14 (emphasis added).

The determination document "needs to be" completed immediately following evaluations.[171]

Where the team concludes existing grazing is a significant factor in a rangeland's failure to meet one or more of the standards, the officer "must take appropriate action as soon as practicable but no later than the beginning of the next grazing year to bring grazing activities into conformance with grazing guidelines or to modify them so that significant progress can be made toward achieving Land Health Standards."[172] This requirement involves developing and implementing a plan to bring the area into achievement with the Fundamentals, which can include proposals to modify terms and conditions in grazing permits and leases, and implementing restoration projects and range improvements.[173]

Appendix B—Forest Service Guidance Documents

The Forest Service has no comprehensive federal grazing regulations in place to which permits must conform. The agency issues three types of grazing permits: term, temporary, and livestock use permits.[174] The permitting scheme generally only requires base property and livestock ownership, with no extensive requirements concerning the management of grazing lands.[175]

Instead, the Forest Service's primary form of grazing management and health is through guidance documents, like handbooks and manuals.[176] Forest Service Handbook (FSH) 2209.13 describes the process for analyzing potential environmental effects of proposed grazing actions, pursuant to NEPA[177]; FSH 2209.16 discusses rangeland capability and suitability assessments.[178] However, because these handbooks are internal guidance documents, there is no legal mechanism in place to ensure the Forest Service actually complies with them.

A. NEPA Compliance—FSH 2209.13

FSH 2209.13 provides a step-by-step guidance for how to determine whether livestock grazing is an acceptable use on a given allotment of NFS land.[179] FSH 2209.13 describes two possible routes for environmental analyses when a proposed action involves livestock grazing.[180] The first is a "broad" action, where several actions are encompassed into one action in order to achieve desired rangeland conditions.[181] The Forest Service considers the second to be a "narrow" action, where the focus is on whether livestock grazing is consistent with the applicable land and resource management plan.[182]

Although both require some form of environmental analysis to comply with NEPA, broad actions usually receive more complex environmental analyses than narrow actions.[183] The delegated officer implementing the action has considerable discretion in determining the scope of an action, and thus how complex of an environmental analysis the action receives.[184]

Conducting the rangeland management planning for a proposed action involving livestock grazing consists of three steps: (1) plan-to-project; (2) project initiation; and (3) project-level planning process and NEPA compliance.[185] The plan-to-project phase helps inform the later NEPA planning process in step three, and involves identifying desired and existing conditions, resource management needs, possible practices, and information needs, with the implementing officer deciding how in-depth these analyses are.[186] The desired and existing conditions "should be specific, quantifiable, and focused," with the existing conditions accounting for "ecological status of the vegetation, composition and arrangement of plant communities, status and function of riparian areas and wetlands, stream bank and stream channel characteristics, wildlife and fish habitat characteristics, cultural resource protection, soil protection, and water quality."[187] The handbook states that "where an existing condition and a desired condition are not the same, there is a need for change. A need for change should equate to the purpose and need for the action to be proposed."[188]

The second phase, project initiation, involves developing a decision framework, purpose and need statement, and the proposed action itself.[189] In order to authorize livestock grazing, the decision framework involves asking whether livestock grazing should be authorized on all, in part, or none of the project area, and what management practices were necessary to maintain, or move the project area toward, the identified desired conditions.[190] Then, after this suitability analysis, in considering the proposed action, an allotment management plan (AMP) may be developed as well—both of which trigger NEPA analysis, the third step.[191]

171. *Id.*
172. *Id.*
173. *Id.* at III-15; 43 C.F.R. §4180.2(c) (2020).
174. U.S. Forest Service, *Rangeland Management—How Do I Get a Grazing Permit?*, https://www.fs.fed.us/rangeland-management/grazing/permits.shtml (last visited Feb. 13, 2022).
175. *Id.*
176. U.S. Forest Service, *Proposed Rangeland Management Directives Update*, https://www.fs.fed.us/rangeland-management/directives.shtml (last visited Feb. 13, 2022) ("The Forest Service rangeland management directives are comprised of Forest Service Manual (FSM) 2200, Forest Service Handbook (FSH) 2209.13 and FSH 2209.16.").
177. U.S. Forest Service, FSH 2209.13—Grazing Permit Administration Handbook ch. 90 (2005), https://www.fs.fed.us/im/directives/fsh/2209.13/2209.13_90_Rangeland%20Management%20Decision-Making_clear.doc.
178. U.S. Forest Service, FSH 2209.16—Allotment Management Handbook ch. 10 (2020), https://www.fs.fed.us/rangeland-management/documents/directives/FSH2209-16-AllotmentMgmt-Proposed.pdf.
179. U.S. Forest Service, FSH 2209.13, *supra* note 176, at 2.
180. *Id.*
181. *Id.*
182. *Id.*; 16 U.S.C. §§1600-1687, ELR Stat. NFMA §§2-16.
183. U.S. Forest Service, FSH 2209.13, *supra* note 176, at 9.
184. *Id.*
185. *Id.* at 3.
186. *Id.* at 3-4.
187. *Id.* at 4.
188. *Id.*
189. *Id.* at 6.
190. *Id.* at 6-7.
191. *Id.* at 7-8 (the AMP should include (1) management objectives for the rangeland resources' conditions and trends; (2) required livestock management practices; (3) necessary structural and nonstructural improvements;

The third step, the NEPA analysis, requires "a site-specific analysis of environmental effects of livestock grazing projects on affected National Forest System lands and resources" before the agency may issue a grazing permit.[192] During the NEPA analysis, the Forest Service determines whether grazing will have a significant environmental effect on the proposed area, and thus whether the proposed grazing can proceed in compliance with NEPA.[193] The Forest Service has a separate handbook, FSH 1909.15, which discusses the NEPA process and requirements in detail.[194] The major focus of the NEPA analysis is whether the agency can authorize grazing while maintaining (or moving toward achieving) the desired land condition.[195]

B. *Rangeland Capability and Suitability—FSH 2209.16*

NFMA requires the Forest Service to perform suitability analyses on rangelands in developing or revising forest plans for its national forests.[196] The rangeland suitability analysis is codified in two Forest Service regulations[197] and divided into two parts: capability and suitability.[198] The determination of rangeland capability is the first step in the suitability analysis; the regulations define it as "[t]he ecological capacity or inherent potential of an area characterized by the interrelationship of its physical elements, its climatic regime, and natural disturbances."[199] Determining rangeland capability involves compiling extensive data on the land ownership, soil quality, geology, hydrology, and development in the area, although the handbook notes "at times not all of this information may be available or required."[200]

The handbook also provides a recommended process for conducting a capability assessment, which contains descriptions of lands typically not capable of sustaining grazing practices.[201] For example, the recommended process suggests that Forest Service local supervisors subtract soil types "not inherently capable of producing more than 200 pounds of forage/acre within their potential natural [c]ommunity," as well as slopes greater than 60%, from the amount of national forest lands capable for grazing.[202] At the completion of the capability analysis, Forest Service supervisors should be able to provide figures for the amount of capable rangeland for cattle and sheep grazing, respectively.[203] Any land considered not capable is, by default, not suitable for grazing, and is thus removed from the suitability analysis.[204]

The next step is determining the capable rangelands' suitability for grazing.[205] The handbook lists 15 types of data needed to complete the suitability analysis, although it notes that, like the capability analysis, "[a]t times not all of this information may be available or required."[206] The basic required data essentially detail areas where livestock grazing is, or is proposed to be, excluded for reasons such as preservation of listed species' habitats.[207]

The handbook once again provides a detailed recommended process for determining suitability, with characterizations of lands typically not suitable for grazing practices and listed possible sources of data, like harvest maps and records.[208] Among other things, the process describes subtracting areas from the amount of suitable rangelands for grazing on the basis of conflicts with forest vegetation restoration, wildlife, and recreation.[209] The final result should total acreage in the planning unit suitable for grazing by cattle and sheep.[210]

Once the Forest Service completes both the capability and suitability analyses, the local supervisor makes a suitability determination.[211] This suitability determination "provides basic information regarding the potential of the land to produce resources and supply goods and services in a sustainable manner, as well as the appropriateness of using that land in a given manner."[212] This determination assists the Forest Service IDT and the authorized officer in making forest/grassland-level decisions and evaluating alternatives, and is also included in the environmental impact statement when the agency conducts a NEPA analysis.[213]

and (4) "[a]ppropriate monitoring to determine if management objectives are being met or if adaptive management alterations are needed").

192. *Id.* at 10.
193. *Id.*
194. *Id.*; *see* U.S. Forest Service, FSH 1909.15—National Environmental Policy Act Handbook ch. 10 (2012), https://www.fs.fed.us/im/directives/fsh/1909.15/wo_1909.15_10_Environmental%20Analysis.doc.
195. U.S. Forest Service, FSH 2209.13, *supra* note 176, at 13.
196. 16 U.S.C. §1604(g)(2)(A). BLM's Fundamentals are the BLM version of suitability analysis, but the Fundamentals require BLM to take action when rangeland conditions fail to meet rangeland health standards; the Forest Service retains discretion to decide to continue grazing on rangelands the agency finds are not suitable for grazing.
197. U.S. Forest Service, FSH 2209.16, *supra* note 177, at 18 ("[t]he implementing regulations are found at 36 C.F.R. §§219.15 and 219.7"); *see also* 36 C.F.R. §219.7(e)(1)(v) (2021):

> Specific lands within a plan area will be identified as suitable for various multiple uses or activities based on the desired conditions applicable to those lands. The plan will also identify lands within the plan area as not suitable for uses that are not compatible with desired conditions for those lands. The suitability of lands need not be identified for every use or activity. Suitability identifications may be made after consideration of historic uses and of issues that have arisen in the planning process.

id. §219.15(d)(4) ("[a] project or activity would occur in an area: (i) [t]hat the plan identifies as suitable for that type of project or activity; or (ii) [f]or which the plan is silent with respect to its suitability for that type of project or activity").
198. U.S. Forest Service, FSH 2209.16, *supra* note 177, at 19.
199. *Id.*
200. *See id.* at 19-20 (contains an extensive list of the basic information needed to complete a capability assessment).
201. *See id.* at 20-22 (step-by-step process of which lands to subtract as not capable for grazing, including an exhibit on page 22 of how the process should look).
202. *Id.* at 20-21.
203. *Id.* at 21.
204. *Id.* at 23.
205. *Id.* at 22.
206. *Id.*
207. For a complete and detailed list of areas, see *id.* at 23-24.
208. *See id.* at 23-26 (explaining a comprehensive process for subtracting lands not suitable for grazing from the lands determined capable for grazing).
209. *Id.*
210. *See id.* at 27 (providing an example of how the total amount of land suitable for grazing is calculated through the process described in the handbook).
211. *Id.*
212. *Id.* at 28.
213. *Id.* at 28-29.

However, the handbook explains that the suitability determination is not binding on permit decisions, nor is it a binding decision on the livestock grazing capacity of an area.[214] Further, the handbook states suitability determinations "are not intended to imply that livestock will be precluded from being found on lands that may be modeled as other than capable."[215] Thus, although capability and suitability analyses are required by NFMA, the Forest Service has broad discretion as to both the conduct of the analyses as well as the weight given to them in subsequent permit and capacity determinations.

Appendix C—BLM DFO Watershed Assessment Process

DFO divided its lands into 17 watersheds for assessment by its IDT, which consists of a designated leader and 10 to 14 specialists in the areas of range, weeds, hydrology, wildlife, fisheries, forestry, fuels, minerals, lands, wilderness, cultural resources, and recreation.[216] The DFO field manager assigns specialists to the IDT annually, requiring IDT members to fully participate in field assessments, IDT meetings, and any other work associated with preparation of the watershed assessment report and watershed environmental assessment (EA) report.[217] In assigning specialists to the IDT, the DFO field manager specifies deadlines that the IDT must meet that year, including deadlines for field assessment completion, the watershed assessment report, the EA, and the proposed and final decisions.[218]

When an assessment begins, the IDT physically visits all grazing allotments within the watershed area; typically, the IDT completes two to three weeks of field work during the assessment process.[219] Field work involves, but is not limited to, tasks such as taking soil samples, reviewing historic monitoring data, walking each stream reach or wetland area, and evaluating plant and wildlife habitats.[220] Each IDT member is to rate the lands within the assessment area in comparison to the five Montana/Dakotas rangeland health standards, which mirror the federal rangeland health standards: (1) uplands, (2) riparian/wetland, (3) water quality, (4) air quality, and (5) biodiversity.[221] The IDT rates each allotment as either in proper functioning condition, functioning at risk (FAR), or non-functional (NF)—requiring each allotment with FAR or NF ratings to note the general trend (upward, static, or downward), in comparison to these five standards.[222]

The IDT follows detailed assessment procedures for its evaluation of each standard; for example, determining whether the biodiversity standard has been met involves comparing the present state of each habitat type within each allotment with the natural and historic condition of each.[223] Once the IDT completes the assessment of the entire watershed area, the team completes an assessment report—typically about 70 pages long—by the end of the calendar year, documenting all of its findings during the field work.[224] Each IDT member's comments, evaluations, and ratings are documented, after which the IDT develops a majority opinion on the resource condition ratings for each site.[225] Minority opinions are typically included in the assessment report for the authorized officer's consideration.[226]

The IDT then submits the assessment report to the authorized officer, who then determines whether BLM is meeting its standards on each grazing allotment within the watershed areas assessed.[227] A standard fails if the IDT rates an allotment's conditions FAR with a static or downward trend, or NF.[228] If so, the authorized officer must develop alternatives to improve rangeland conditions if the cause(s) of poor rangeland health is within the authorized officer's control.[229]

Through this assessment process, the IDT also develops an EA (required by NEPA), which typically evaluates alternative actions to address resource concerns and includes a watershed monitoring plan to measure progress toward meeting rangeland health standards.[230] The EA is publicly available for review and comment and sent to affected and interested parties.[231] Based on IDT recommendations, the predicted effects provided in the EA, and public comments, the authorized officer then issues a proposed decision, in which the authorized officer selects alternative(s) from the EA.[232] A 15-day protest period follows, enabling opponents to voice objections.[233] The authorized officer then issues a final decision, with a 30-day appeal period.[234] The final decision "includes renewing all grazing permits and leases within the watershed for a 10-year term."[235]

214. *Id.* at 27.
215. *Id.* at 28 (the handbook notes livestock may be found on lands deemed incapable for grazing because the suitability determinations inherently encompass a "variety of complex landscapes" in one area; thus, the handbook states the "intermingling" of areas capable/suitable and areas modeled as not capable/suitable is "inevitable").
216. Martin et al., *supra* note 102, at 26.
217. *Id.*
218. *Id.*
219. *Id.* at 27.
220. *Id.* at 27-28.
221. *Id.* at 26-28.
222. *Id.* at 26.
223. *Id.* at 27-28 (this involves assessing "the range of natural variation within the community, as well as the species composition, condition of available habitat, and forest health to determine the condition/function of biodiversity").
224. *Id.* at 28.
225. *Id.* at 30.
226. *Id.*
227. *Id.* at 28.
228. *Id.* at 26-28.
229. *Id.*
230. *Id.* at 28.
231. *Id.*
232. *Id.*
233. *Id.* (the proposed decision is also issued outside the field work season, May 1 to August 31).
234. *Id.*
235. *Id.* at 29.