NATIONAL GRASSLANDS MANAGEMENT

A PRIMER

November 1997

Eric Olson
Natural Resources Division
Office of the General Counsel
United States Department of Agriculture

TABLE OF CONTENTS

INTRODUCTION

In September and October 1995, a team of Forest Service officials conducted a management review of national grasslands. The team visited several national grasslands in different states, spoke with Forest Service employees involved in the day-to-day administration of these areas, and met with representatives from Congress, state and local governments, other federal agencies, business interests, grazing permittees, environmental organizations, and private individuals simply interested in the management of national grasslands. In total, the team heard from more than 300 people. Some of what the team heard was positive; some was not. Some of what the team heard dealt with the administration of an individual national grassland unit; some dealt with more systemic concerns related to the administration of all national grasslands.

In December 1995, the team issued a document entitled "Report of the National Grasslands Management Review Team" (hereafter the "Report")[1] and, in May 1996, the Forest Service issued a follow-up "National Grasslands Management Review Action Plan" (hereafter the "Action Plan").[2] One of the principal findings in both the Report and the Action Plan was that the laws, regulations, and policy governing the administration of national grasslands were not well understood or accepted by the public. Perhaps more surprising, however, was the finding in the Report and Action Plan that the laws, regulations, and policy governing the administration of national grasslands were not well understood or accepted by many Forest Service employees either. The Action Plan directed that a "white paper" be prepared to identify and interpret the laws and regulations applicable to the administration of the national grasslands. It was felt that such a "white paper" would assist Forest Service employees involved in the day-to-day administration of the national grasslands and improve their understanding of the laws and regulations applicable to these areas. In so doing, it would also facilitate a more consistent application of the law to similar cases arising on different national grasslands.

---

[1] A copy of the Report is included at Appendix A.

[2] A copy of the Action Plan is included at Appendix B.

This is that “white paper.” Section I briefly identifies the number, size and location of the national grasslands currently administered by the Forest Service. Section II reviews the significant events which led to the establishment of national grasslands. Section III examines the current statutory and regulatory authorities applicable to national grassland management. Section IV addresses a number of frequently asked questions about national grassland administration. Section V summarizes the most important aspects of this primer. Finally, Section VI of this primer contains several appendices of supplementary material that may be useful for current or future reference.

A word of caution. While this primer contains the most up-to-date information and is perhaps the most comprehensive collection of material pertaining to the administration of national grasslands, it will need to be revised and updated periodically to take into account changes in law and policy. In addition, since this primer is intended to benefit the largest possible audience, much of the analysis is necessarily somewhat generic. While this primer should facilitate analysis of many problems which may arise from time to time on the national grasslands, the actual outcome in any given case may well depend on the specific facts of that case. Consequently, the Forest Service should, whenever feasible, consult with the Office of the General Counsel for more particular advice on how to deal with a specific problem.

I. SIZE, NUMBER, AND LOCATION OF NATIONAL GRASSLANDS

By law, the Forest Service is responsible for the administration of the 191 million acres of federal land that comprise the National Forest System. The largest component of the National Forest System is, by far, the national forests. There are 155 national forests which contain more than 187 million acres of federal land. This amounts to almost 98% of the total acreage in the National Forest System.

The second largest component of the National Forest System is the national grasslands. The Forest Service currently administers twenty national grasslands consisting of 3,842,278 acres of federal land. National grasslands are located in thirteen states. However, nine national grasslands consisting of 3,161,771 acres of federal land are in the Great Plains states of Colorado, North Dakota, South Dakota, and Wyoming. National grasslands in these four states alone thus contain more than 82% of the total national grassland acreage.

The following table lists each national grassland, its acreage, and the state(s) in which it is located.[3]

National Grassland	Acreage	State(s)
Black Kettle	31,286	OK, TX
Buffalo Gap	597,178	SD
Butte Valley	18,425	CA
Caddo	17,873	TX
Cedar River	6,717	ND
Cimarron	108,175	KS
Comanche	435,359	CO
Crooked River	111,348	OR
Curlew	47,756	ID
Fort Pierre	115,997	SD
Grand River	154,981	SD
Kiowa	136,417	NM
Little Missouri	1,028,045	ND
Lyndon B. Johnson	20,309	TX
McClellan Creek	1,449	TX
Oglala	94,480	NE
Pawnee	193,060	CO
Rita Blanca	92,989	OK, TX
Sheyenne	70,268	ND
Thunder Basin	560,166	WY
TOTAL	3,842,278	

[3] Figures in the table are derived from the Forest Service publication, Land Areas of the National Forest System, (Jan. 1997).

II. HISTORY AND ORIGIN OF THE NATIONAL GRASSLANDS

Although national grasslands were not officially designated as such until 1960, the events which led to their origin are generally traced back almost one hundred years earlier, to the time of the Civil War.

In order to facilitate settlement of the Great Plains and other areas of the sparsely populated West, Congress enacted the Homestead Act of 1862 which authorized the disposition of 160 acre parcels of federal land to qualified individuals.[4] To those who met the requirements, the land was free except for filing fees. Following the submission of an application, a homesteader was allowed six months to establish a residence on the land. Actual settlement and cultivation of the land were required for five years after which a patent would be issued to the homesteader.

While over 600 million acres of land was initially available for homesteading under the 1862 Act, relatively little of it was arable.[5] In addition, because of the low average annual precipitation in many parts of the West, it was frequently difficult to conduct an economically viable farming operation under the 160 acre limitation imposed by the Homestead Act. Even when Congress enacted the Enlarged Homestead Act in 1909,[6] doubling to 320 acres the amount of land that could be homesteaded west of the 100th meridian, the farming lifestyle was still rigorous to say the least.[7]

---

[4] The Homestead Act, 43 U.S.C. §161, governed the disposition of agrarian land for 114 years until it was repealed by the Federal Land and Policy Management Act of 1976 (FLPMA), 43 U.S.C. §§1701 et seq.

[5] By 1862, approximately 440 million acres of the most valuable land in the West was already controlled by states, railroads, and indian tribes and was therefore unavailable for homesteading.

[6] 43 U.S.C. §§218-221. This law was also repealed by FLPMA in 1976.

[7] In Jonathan Raban's book, Bad Land - An American Romance, a vivid picture of the hardscrabble existence of farmers in Montana between 1917 and 1920 is chronicled.

> When the thaw eventually came [in 1917], the ground was ploughed, the spring wheat planted, and, on several successive mornings, a thin drizzle, more mist than rain, coloured the soil before the sun emerged and baked it dry. In late May, the midday temperature was already in the low nineties. On the Wollaston place, the spring under the lone cottonwood tree, a quarter of a mile west of the house, dried up, and the watering hole turned white, like rutted concrete. The iron windmills that served the cattle-troughs continued to creak monotonously overhead, but produced an alarmingly feeble dribble of yellow-tinged alkali water.

Nonetheless, the lure of free land brought people to the west in droves. By 1904, nearly 100 million acres of western land had been homesteaded into 500,000 farms. Many of these farms were on submarginal lands.[8]

More people flocked to rural lands from cities and towns during the Great Depression of the late 1920's and early 1930's. Unfortunately, this influx of new people often exacerbated the problems of established farmers but did little, if anything, to improve the plight of the newcomers. Foreclosures multiplied, tax delinquencies increased, and farm incomes dwindled. To complicate matters further, the economic hardships suffered by many farmers during this time were accompanied by devastating natural events like droughts, floods, insect infestations, and erosion. In retrospect, it became apparent that thousands of farm families had been living in poverty on submarginal land long before the advent of the Great Depression and the Dust Bowl. These twin events made farming, already a difficult lifestyle, that much more challenging. For many, the additional challenge was simply too much.

Beginning in the 1930's, the Government launched a large scale "land utilization program" (hereafter the "LUP") to respond to many of the agricultural problems plaguing the country.[9] The LUP began as a submarginal land purchase and development program, but gradually evolved and expanded into a program designed to transfer land to its most suitable use. The LUP culminated with the passage of the Bankhead-Jones Farm Tenant Act of 1937 (hereafter the "BJFTA" or the "Act").

…

> In 1917, 11.96 inches of rain fell at Miles City. . . In 1918, 12.62 inches. In 1919, 11.24 inches. In 1920, 12.83 inches. Though the numbers fluctuate slightly, each year was worse than the last, with too little rain falling on ground already parched beyond hope. Fifteen inches of rainfall was the make-or-break rule of thumb. Much less than that, and the topsoil turned to dust, and the hopper squadrons darkened the sky round the edge of the sun.

[8] As used in this primer, "submarginal land" will be used to refer to lands low in productivity or otherwise ill-suited for farm crops. Such land falls below the margin of profitable private cultivation.

[9] Many years ago, an outstanding and detailed examination of the land utilization program was prepared by the Economic Research Service. A copy of The Land Utilization Program 1934 to 1964 - Origin, Development, and Present Status, Agricultural Economic Report No. 85 (1964), is included at Appendix C.

Some of the significant events leading up to the enactment of the BJFTA in 1937 included the following:

- In 1929, Congress enacted the Agricultural Marketing Act which authorized the Federal Farm Board to investigate the utilization of land for agricultural purposes and the possibility of reducing the amount of submarginal land in cultivation.
- In 1931, a National Conference on Land Utilization was convened by the Secretary of Agriculture. The conference participants adopted a series of resolutions, many of which later became guidelines for the LUP. The conference participants also recommended the formation of a National Land Use Planning Committee.
- In 1932, a National Land Use Planning Committee was established to study problems associated with farming submarginal lands. President Hoover acknowledged the work of the Committee and stated that the broad objective of the study of land use problems was to promote the reorganization of agriculture to divert land from unprofitable use and to avoid the cultivation of land that contributed to the poverty of those who lived on it. In 1933, the Committee issued a report concerning the need for public acquisition, retention, and management of submarginal land and the need to relocate farm families to lands based upon the land's adaptability to a particular use.
- In 1934, President Roosevelt established the National Resources Board by executive order. The Board issued a comprehensive report on the land and water resources of the United States. The report advocated, among other things, the adoption of national policies to promote land ownership and land use patterns that are in the public interest, the adoption of national policies to correct maladjustments in land use, the expansion of forest, park, and wildlife refuge landholdings by federal and state agencies, and the acquisition of 75 million acres of land.
- In 1934, the Agricultural Adjustment Administration started a submarginal land purchase program with $25,000,000 in appropriations from the Federal Emergency Relief Administration. A total of 8.7 million acres of land were acquired under this authority.

As noted above, in 1937 at the height of the New Deal, Congress enacted the BJFTA which provided a more permanent status for the LUP. Title III of the Act authorized the Secretary of Agriculture

> to develop a program of land conservation and land utilization, including the retirement of lands which are submarginal or not primarily suitable for cultivation in order thereby to correct maladjustments in land use…

Although a total of $50,000,000 was authorized by Congress for land acquisition in the BJFTA, only $20,000,000 was ultimately appropriated. The Soil Conservation Service administered the LUP from 1938 to 1954.[10]

A total of 2.6 million acres of land were acquired between 1938 and 1946 when purchases under Title III ceased for all practical purposes. With the lands that had previously been acquired, the Government held 11.3 million acres in the LUP. The total cost for the land acquired for the LUP under the BJFTA and the preceding authorities was $47,500,000.[11]

Almost immediately, intensive improvement and development activities began on the LUP lands. New roads, buildings, transportation facilities, and fences were built, flood and erosion control strategies were adopted, grass and trees were planted, water storage facilities were constructed, and stream channels were widened and cleaned. The land improvements cost $102,500,000.[12] Not only did the improvement activities help to restore these badly damaged lands, but they also created more than 50,000 jobs at a time when the Nation was pulling itself out of the Depression.[13]

Much of the LUP land was transferred or sold, principally to other federal agencies. Of the total 11.3 million acres in the LUP, approximately 5.8 million acres were gradually transferred to the Department of the Interior to be administered by the National Park Service, Bureau of Indian Affairs, Fish and Wildlife Service, or Bureau of Land Management. Approximately 5.5 million acres were retained within the Department of Agriculture.

---

[10] Until it found a home in the Soil Conservation Service in 1938, the LUP bounced around five different federal agencies in its first four years of existence. The agencies were the Agricultural Adjustment Administration, The Federal Emergency Relief Administration, the Resettlement Administration, the Farm Security Administration, and the Bureau of Agricultural Economics.

[11] The average price per acre to acquire these lands was $4.40.

[12] The average price per acre to acquire and improve these lands was $13.50.

[13] Some of the projects initiated by the Soil Conservation Service were examined in more detail in The History of Soil and Water Conservation, published by the Agricultural History Society in 1985. A copy of the chapter entitled "National Grasslands: Origin and Development in the Dust Bowl" is included at Appendix D.

In 1954, the Secretary of Agriculture transferred the responsibility for administering the LUP from the Soil Conservation Service to the Forest Service.[14] Approximately 1.5 million acres of LUP land in the South and East wound up being incorporated into new or existing national forests. In 1960, the Secretary designated approximately 3.8 million acres of LUP land mostly in the Great Plains as national grasslands.[15] The remaining approximately 200,000 acres of the LUP lands administered by the Forest Service were designated for disposal or permanent assignment.

Under its administration, the Forest Service continued and expanded upon the improvement activities that had been initiated by the Soil Conservation Service. Surveys of land, water, forest, range, wildlife, and recreation resources were conducted, cooperative land management agreements were entered into with grazing associations and conservation districts, additional revegetation and reforestation measures were instituted, fish and wildlife habitat was improved, and additional recreational opportunities were provided as a result of the construction of new campsites, picnic areas, and reservoirs.

Since 1960, the total size and number of national grasslands has remained relatively constant.[16] As set out in the next section, however, the laws governing the administration of these federal lands has rapidly evolved.

---

[14] 19 Fed. Reg. 74 (Jan. 6, 1954). See, Appendix E. For an interesting discussion of the differences in the prevailing land management philosophies of the Soil Conservation Service and the Forest Service during this transition period, see Rowley, U.S. Forest Service Grazing and Rangelands - A History, at pp. 224-230 (1985).

[15] 25 Fed. Reg. 5845 (June 24, 1960). See, Appendix F.

[16] The most recent addition to the national grasslands occurred in 1991 when the Secretary of Agriculture redesignated the 18,425 acre Butte Valley Land Utilization Project in California as the Butte Valley National Grasslands. 56 Fed. Reg. 8279 (Feb. 28, 1991).

III. STATUTORY AND REGULATORY AUTHORITY APPLICABLE TO NATIONAL GRASSLANDS MANAGEMENT

Before examining the specific statutory and regulatory milieu under which the Forest Service administers national grasslands, it might be worthwhile to step back and review some of the fundamental constitutional and legal principles governing the administration of all federal public lands and resources.

First, the United States Constitution vests in Congress the plenary authority over all federally-owned land. The Property Clause of the Constitution, Art. IV, §3, cl. 2, specifically provides that

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States…

The Supreme Court has consistently recognized the expansiveness of the Property Clause, stating that "the power over the public lands thus entrusted to Congress is without limitations." Kleppe v. New Mexico, 426 U.S. 529, 539 (1976); see also, United States v. Gardner, 107 F.3d 1314 (9th Cir. 1997).[17]

Second, Congress may (and routinely does) delegate its authority over federally owned land to the executive branch through the enactment of statutes. Light v. United States, 220 U.S. 523 (1911); United States v. Grimaud, 220 U.S. 506 (1911). In many instances, more than one statute will apply to the administration of the same unit of public land or to the same resource. Congress may amend statutes from time to time to respond to changing conditions or it may repeal a statute altogether if its objectives have been accomplished or if it has otherwise become obsolete. Sierra Club v. Froelke, 816 F.2d 205 (5th Cir. 1987).

Third, agencies must administer the land under their jurisdiction in a manner that is consistent with the statute(s) by which Congress delegated them this authority. Where more than one

[17] Indeed, Congress may, under the Property Clause, regulate conduct occurring off federal land if it affects federal land. Kleppe, supra; Duncan Energy Co. v. United States Forest Service, 50 F.3d 584, 589 (8th Cir. 1995).

statute applies, agencies are required, to the extent possible, to administer the land in such a way as to give effect to all of the statutes. In re Bulldog Trucking, 66 F.3d 1390 (4th Cir. 1995); Negonsett v. Samuels, 933 F.2d 818 (10th Cir. 1991); Blackfeet Indian Tribe v. Montana Power Co., 838 F.2d 1055 (9th Cir. 1988). In other words, an agency must reconcile the requirements of all applicable law and may not pick and choose from only those which it wants to use in its administration of the land. Muller v. Lujan, 928 F.2d 207 (6th Cir. 1991).[18]

Fourth, agencies may issue regulations to resolve an ambiguity in a statute or to provide further direction on how a statute will be implemented. Virginia v. Browner, 80 F.3d 869 (4th Cir. 1996); Oil, Chemical, and Atomic Workers Int'l Union, AFL-CIO v. National Labor Relations Board, 46 F.3d 82 (D.C. Cir. 1995).

Fifth and finally, an agency's interpretation of the statutes that it is charged with administering is entitled to deference. However, if a court concludes that an agency's interpretation of a statute(s) is "arbitrary and capricious," it will be invalidated. The Administrative Procedures Act, 5 U.S.C. §§701 et seq.; Marsh v. Oregon Natural Resources Council, 490 U.S. 360 (1989).

Against this backdrop, it may be easier to understand the legal environment that applies to the Forest Service's administration of national grasslands. Unfortunately, limitations of time and space do not permit an exhaustive recitation of each and every statute that applies to the national grasslands. Some of the most important statutes will be discussed, however.

[18] Invariably, there will arise on occasion situations where there is an irreconcilable conflict between the applicable statutes. The general rule in these cases is that the most recent and more specific congressional pronouncement will prevail over a prior, more generalized statute. Natural Resources Defense Council v. United States Environmental Protection Agency, 824 F.2d 1258 (1st Cir. 1987).

Clearly, this analysis starts with the BJFTA which, as was noted in the previous section, became law in 1937.[19] The preamble to the BJFTA stated that its purpose was

> to create the Farmers' Home Corporation, to promote more secure occupancy of farms and farm homes, to correct the economic instability resulting from some present forms of farm tenancy and for other purposes.[20]

Congress was acutely aware of the many problems facing American agriculture in the 1930's. It believed that some of these problems were attributable to the difficulty associated with the purchase and successful operation of a farm and some were attributable to the continuation of poor or inappropriate farming practices on submarginal land.[21] Thus, in enacting the BJFTA, Congress sought to encourage and facilitate farm ownership and to remove submarginal land from cultivation.

The BJFTA contained four titles. Title I authorized the Secretary of Agriculture to make loans to farm tenants, farm laborers, sharecroppers and others for the purchase of farms of sufficient size for a family to earn a living. Title II authorized rehabilitation loans and the voluntary adjustment of indebtedness between farm debtors and their creditors. Title IV established the Farmers Home Corporation in USDA to implement and administer the Act.[22]

---

[19] P.L. 75-210 (codified at 7 U.S.C. §§1010-1012). The original text of the Bankhead-Jones Farm Tenant Act of 1937 is contained in Appendix G.

[20] In response to the oft repeated contention that the Forest Service should recognize livestock grazing as the preferred and predominant use on national grasslands because it would "promote more secure occupancy of farms and farm homes," the following should be noted. First, the preamble of a statute is not part of the statute. See, Jurgensen v. Fairfax County, Virginia, 745 F.2d 868, 885 (4th Cir. 1984) ("The preamble no doubt contributes to a general understanding of a statute, but it is not an operative part of the statute and does not enlarge or confer powers on administrative agencies or officers. Where the enacting or operative parts of a statute are unambiguous, the meaning of the statute cannot be controlled by language in the preamble. The operative provisions of statutes are those which prescribe rights and duties and otherwise declare the legislative will.") Second, to the extent that this preamble contributes to a better general understanding of the BJFTA, it must be considered in the context of the entire BJFTA, not just Title III in isolation. Third, it is not at all apparent from the BJFTA whether livestock grazing on national grasslands is even one (let alone the only) way that the secure occupancy of farms and farm homes may be promoted.

[21] The conference report on the BJFTA, and relevant excerpts from the Congressional Record concerning the passage of the BJFTA are contained in Appendix H.

[22] Titles I, II, and IV were repealed by Congress in the Agricultural Act of 1961. P.L. 87-128.

Title III, as discussed previously, resulted in the formal establishment of the LUP.[23] Specifically, Section 31 of Title III authorized and directed the Secretary to

> develop a program of land conservation and land utilization, including the retirement of lands which are submarginal or not primarily suitable for cultivation, in order thereby to correct maladjustments in land use, and thus assist in controlling soil erosion, reforestation, preserving natural resources, mitigating floods, preventing impairment of dams and reservoirs, conserving surface and subsurface moisture, protecting the watersheds of navigable streams, and protecting the public lands, health, safety and welfare.

Section 32 of Title III authorized the Secretary to, among other things, acquire, dispose of, and administer land as well as to promulgate regulations to prevent trespasses on the land and otherwise regulate its use and occupancy. Section 33 of Title III authorized the Secretary to pay counties 25% of the net revenues received on lands acquired under this authority. Section 34 authorized the appropriation of $50 million for land acquisition.[24]

Title III has been amended several times by Congress since 1937. These amendments included:

- In 1962, Congress deleted "including the retirement of lands which are submarginal or not primarily suitable for cultivation" from the purpose of the land conservation and land utilization program in Section 31.
- In 1962, Congress added "protecting fish and wildlife," and "but not to build industrial parks or establish private industrial or commercial enterprises" to the list of goals and objectives for which LUP lands may be administered in Section 31.
- In 1962, Congress repealed the Secretary's land acquisition authority in Section 32.

---

[23] Interestingly, Title III was included in the House bill (HR 7562 introduced by Congressman Jones), but there was no companion provision in the Senate bill (S. 106 introduced by Senator Bankhead). The conference committtee accepted the House version of Title III which was incorporated into the enacted bill. A detailed review of the legislative history of Title III was prepared by USDA's Office of the Solicitor and is attached at Appendix I.

[24] As noted previously, only $20 million was ultimately appropriated for that purpose. During the floor debate over the passage of the BJFTA, Congressman Coffee observed that

> Under Title III funds are authorized for the purchase by the Government of submarginal lands. This would be a continuation of the present program and in many states additional purchases are necessary to block together the purchases already made. The objective is to retire this submarginal land from unprofitable crop production and to turn it back to grass and in to grazing and forest areas. In purchasing the land, the Government will have something to show for the money it spent. It will help to relieve crop surpluses, especially in wheat, since in good years this submarginal land helps to swell the price depressing surplus…

81 Cong. Rec. 6471 (June 28, 1937).

- In 1962, Congress established new authority in Section 32 enabling the Secretary to award grants to assist state and local governments with their land utilization programs.[25]
- In 1966, Congress added "protecting recreational facilities" to the list of goals and objectives for which the LUP may be administered in Section 31.[26]
- In 1981, Congress added "developing energy resources" to the list of goals and objectives for which the LUP may be administered in Section 31.[27]

Incorporating the above amendments, Section 31 today reads as follows:

> The Secretary is authorized and directed to develop a program of land conservation and land utilization, in order thereby to correct maladjustments in land use, and thus assist in controlling soil erosion, reforestation, preserving natural resources, protecting fish and wildlife, developing and protecting recreational facilities, mitigating floods, preventing impairment of dams and reservoirs, developing energy resources, conserving surface and subsurface moisture, protecting the watersheds of navigable streams, and protecting the public lands, health, safety, and welfare, but not to build industrial parks or establish private industrial or commercial enterprises.[28]

The BJFTA originated in response to the profound agricultural problems in the United States in the 1930's which were brought to a head by the Great Depression and Dust Bowl. Title III enabled the Government to acquire submarginal land and take it out of production, rehabilitate and improve the acquired land which had been ravaged by inappropriate farming practices, and manage the acquired land for a mix of different uses which were more suitable than farming. There have been some major changes in the BJFTA in the intervening 60 years, most notably the repeal of Titles I, II, and IV, the revision of the goals and objectives of the LUP in Title III, and the elimination of the Secretary's land acquisition authority in Title III. The BJFTA nonetheless continues to be one of the principal laws governing the Forest Service's administration of national grasslands. Yet it is by no means the only law governing the Forest Service's administration of these areas.

---

[25] All of the 1962 amendments were contained in the Food and Agriculture Act of 1962, P.L 87-703.

[26] The 1966 amendment was contained in P.L. 89-796.

[27] The 1981 amendment was contained in the Agriculture and Food Act of 1981, P.L. 97-98.

[28] 7 U.S.C. §1010. The entire text of Title III of the BJFTA as it appears in the 1997 edition of the United States Code is contained in Appendix J.

In the 1960's and 1970's Congress enacted several laws in response to the gathering momentum of the environmental movement and growing dissatisfaction with national forest management. Many of these laws apply to the administration of national grasslands.

In 1969, Congress enacted the National Environmental Policy Act, 42 U.S.C. §§4321 et seq., which generally requires federal agencies to evaluate the environmental impact of "major federal actions significantly affecting the quality of the human environment."

In 1973, Congress enacted the Endangered Species Act, 16 U.S.C. §§1531 et seq., which generally requires federal agencies to ensure that their actions are not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of critical habitat of such species.

In 1974, Congress enacted the Forest and Rangeland Renewable Resources Planning Act of 1974, P.L. 93-378 (hereafter the "RPA") which requires the Forest Service to prepare a renewable resource assessment, implement a renewable resource program, conduct a resource inventory, and develop land and resource management plans for units of the National Forest System.[29] Of particular significance for national grasslands was the definition of "National Forest System" in Section 11(a) of the RPA which encompassed all the lands under the jurisdiction of the Forest Service including national grasslands. Specifically, this provision stated that

> Congress declares that the National Forest System consists of units of federally owned forest, range, and related lands throughout the United States and its territories, united into a nationally significant system dedicated to the long-term benefit for present and future generations, and that it is the purpose of this section to include all such areas into one integral system. ***The "National Forest System shall include all*** National Forest lands reserved or withdrawn from the public domain of the United States, all National Forest

---

[29] In 1976, Congress passed the National Forest Management Act, P.L. 94-588 (codified at 16 U.S.C. §§1600 et seq.) (hereafter "NFMA"), which amended RPA and added more specific requirements to the Forest Service planning obligations. In particular, Section 6(e) of NFMA required that the land and resource management plans for National Forest System units

> 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 (citation omitted), and, in particular, include coordination of outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness.

16 U.S.C. §1604(e).

> lands acquired through purchase, exchange, donation, or other means, ***the National Grasslands and land utilization projects administered under Title III of the Bankhead-Jones Farm Tenant Act*** (citations omitted), and other lands, waters, or interests therein which are administered by the Forest Service or are designated for administration through the Forest Service as a part of the system…

(codified at 16 U.S.C. §1609(a)) (emphasis supplied). The legislative history acknowledged that the lands administered by the Forest Service had diverse origins and that the purpose of incorporating in the law a definition of the "National Forest System" was to unequivocally declare that all lands administered by the Forest Service are part of a unitary National Forest System. S. Rep. No. 686, Comm. on Agriculture and Forestry, 93rd Cong. 2nd Sess. (1974)(reprinted in 1974 U.S.C.C.A.N. 4060, 4080). Thus, national grasslands, by virtue of being expressly included within the ambit of the "National Forest System," became subject to the planning provisions of RPA and NFMA as well as to a panoply of other laws that applied generally to the Forest Service in the administration of lands under their jurisdiction. Some of these laws include the Organic Administration Act, 16 U.S.C. §§473 et seq., the Multiple-Use Sustained-Yield Act, 16 U.S.C. §§528 et seq., the Wilderness Act, 16 U.S.C. §§1131 et seq., the Wild and Scenic Rivers Act, 16 U.S.C. §§1271 et seq., the National Trails System Act, 16 U.S.C. §§1241 et seq., the Mineral Leasing Act of 1920, 30 U.S.C. §§181et seq., the Granger-Thye Act, 16 U.S.C. §§580 et seq., the Knutson-Vandenberg Act, 16 U.S.C. §§576 et seq., and others.[30]

In addition to the aforementioned statutory authorities, there are several regulations which apply to the Forest Service's administration of national grasslands as well. Foremost among these are the general regulations pertaining to the national grasslands set forth at 36 C.F.R. §213 (hereafter "the 213 Regulations").[31] Among other things, the 213 regulations direct that: the national grasslands be "permanently held" by the Department of Agriculture; the national grasslands be administered under "sound and progressive principles of land conservation and multiple use, and

---

[30] Interestingly, two statutes that apply to certain national forests but not to the national grasslands are the grazing provisions of FLPMA, 43 U.S.C. §§1751 et seq., and the Public Rangelands Improvement Act, 43 U.S.C.§§1901 et seq. (hereafter "PRIA"). Subchapter IV of FLPMA specifically applies to grazing on "lands within National Forests in the sixteen contiguous Western States." 43 U.S.C. §1752(a). PRIA contains an express exemption for national grasslands. 43 U.S.C. §1907.

to promote development of grassland agriculture and sustained-yield management of the forage, fish and wildlife, timber, water, and recreation resources…";[32] the national grassland resources are managed so as to "maintain and improve soil and vegetative cover and to demonstrate sound and practical principles of land use for the areas in which they are located"; and that to the extent feasible, policies for the administration of national grasslands "exert a favorable influence for securing sound land conservation practices on associated private lands." Id.

The 213 regulations also specifically provide that other regulations applicable to national forests are incorporated and apply to regulate the protection, use, occupancy, and administration of the national grasslands to the extent that they are not inconsistent with the provisions of the BJFTA. Id. at §213.3(a).[33] Consequently, regulations governing livestock grazing at 36 C.F.R. §§222 et seq., regulations governing timber harvesting at 36 C.F.R. §§223 et seq., regulations governing mining at 36 C.F.R §§228 et seq., regulations governing special uses at 36 C.F.R. §§251 et seq., regulations governing prohibitions at 36 C.F.R. §§261 et seq., and regulations governing administrative appeals at 36 C.F.R. §§215, 217, and 251 et seq., among others all apply to the national grasslands unless it can be demonstrated that to do so would conflict with the requirements of the BJFTA.

To summarize, the Forest Service is charged with administering the national grasslands in conformance with all applicable federal laws and regulations. To be sure, one of the applicable laws is the BJFTA. However, there are many other laws and regulations that apply to the national grasslands as well. The Forest Service must take into account all of these laws in its

---

[31] The 213 regulations are set forth in their entirety at Appendix K.

[32] The term "grassland agriculture" does not appear in the BJFTA nor is it defined in the 213 regulations. At one time, Section 1034 of the Forest Service Manual contained the following definition of "grassland agriculture" as applied to national grasslands

> The management and utilization of the land resources and values within grassland biomes in harmony with nature's requirements and behavior to foster long-term economic stability and productivity of the land base and quality of life of the people and communities associated with it.

This section has since been repealed.

[33] This provision stipulates that the authority to "acquire lands, to make exchanges, to grant easements, and enter into leases, permits, agreements, contracts, and memoranda of understanding involving such lands under such terms and conditions and for such consideration, fees, or rentals" shall continue to be controlled by the BJFTA.

decisionmaking process. Given the unusually expansive language of the BJFTA, it is difficult (though perhaps not impossible) to envision how its requirements might conflict with those of another applicable statute.[34]

[34] No lawsuit has thus far challenged the Forest Service's administration of national grasslands as a unit of the National Forest System as a violation of the BJFTA. Indeed, two recent decisions simply presumed this fact. Duncan Energy Co. v. United States Forest Service, 50 F.3d 584, 589 (8th Cir. 1995)("Under the [BJFTA], Congress directed the Secretary of Agriculture 'to develop a program of land conservation and land utilization.' The Act directs the Secretary to make rules as necessary to 'regulate the use and occupancy' of acquired lands and to 'conserve and utilize' such lands. The Forest Service, acting under the Secretary's direction, manages the surface lands here as part of the National Grasslands, which are part of the National Forest System. Congress has given the Forest Service broad power to regulate Forest System land.") (citations omitted); see also, Sharps v. United States Forest Service, 28 F.3d 851, 852 (8th Cir. 1994).

IV. ANSWERS TO FREQUENTLY ASKED QUESTIONS ABOUT NATIONAL GRASSLANDS MANAGEMENT

Over the last several years, many questions have arisen concerning the administration of national grasslands. The following answers may be of some assistance and provide preliminary guidance leading towards the resolution of some of these longstanding issues. However, the answers are brief and, in many instances, somewhat generic. For further assistance in the resolution of specific cases or disputes, the local OGC office should be consulted.

A. The Bankhead-Jones Farm Tenant Act (BJFTA)

1. What was the congressional intent in enacting the BJFTA?

   Though the legislative history on the BJFTA is relatively sparse, Congress apparently sought to address what it perceived to be two major problems plaguing American agriculture during the Great Depression years of the 1930's - the difficulty associated with securing the necessary capital to acquire and successfully operate a family farm and the economic and environmental harms caused by farming submarginal land. Titles I, II and IV principally addressed the former problem while Title III principally addressed the latter.

2. What effect, if any, does the phrase in the BJFTA preamble "to promote more secure occupancy of farms and farm homes" have on Title III?

   Extremely limited. In the first place, the preamble is not a part of the statute. Furthermore, to the extent it contributes to a better understanding of the statute, the preamble must be considered in the context of the entire statute, not just one part of it.

3. Does the phrase "to promote more secure occupancy of farms and farm homes" in the BJFTA preamble require that Forest Service establish livestock grazing as the preferred or dominant use of national grasslands relative to other permissible uses of these lands?

   No. As noted in A2 above, the preamble is not part of the BJFTA and must be considered in the context of the entire BJFTA, not just Title III. Furthermore, in order to reach this conclusion, it would necessitate a finding that the only way to promote secure

occupancy of farms and farm homes was by making livestock grazing the dominant use of national grasslands. There is simply no support in the BJFTA or its legislative history which would justify this leap of faith.

In fact, one might argue that inasmuch as Congress intended in the BJFTA to accomplish the twin objectives of facilitating farm ownership and curtailing destructive farming practices on submarginal lands, it was probably the loan provisions of Titles I, II, and IV which were the principal means by which Congress intended to "secure occupancy of farms and farm homes." To the extent Title III furthered the goal of securing occupancy of farms and farm homes, this was primarily accomplished through acquisition and retirement of submarginal land. In other words, by taking submarginal lands out of production, farmers would receive better prices for crops grown on the lands that remained in cultivation and thus would be “more secure.”

In summary, Congress sought to "secure occupancy of farms and farm homes" in the BJFTA through the establishment of loan programs and the retirement of submarginal land. While grazing was clearly envisioned as one of the uses to which the retired land could be put, we have found no support for the proposition that Congress envisioned grazing on lands acquired under Title III as one of the means (let alone the preferred means) by which the "secure occupancy of farms and farm homes" could be accomplished.

B. Livestock Grazing on National Grasslands

1. <u>What is a grazing agreement and to whom may such an agreement be issued?</u>

A grazing agreement is a type of grazing permit which authorizes eligible grazing associations organized under state law to make a specified amount of grazing use on National Forest System lands for a period of ten years or less. 36 C.F.R. §222.3(c)(1). Grazing agreements include provisions for the association to issue grazing permits to their members. The association then assumes the responsibility for administering the permits it issues in conformance with the applicable law and regulations, allotment management plans, and rules of management.

In order to qualify for a grazing agreement, a grazing association must demonstrate to the satisfaction of the Forest Service that: 1) it is qualified and competent to manage grazing

of livestock on lands to be placed under its control; 2) it is a bona fide mutual benefit or cooperative organization incorporated or otherwise established in conformity with the law of the state or states where the lands under its control are located; 3) it is empowered under state law to engage in activities contemplated by the grazing agreement for mutual benefit of its members or other permittees; 4) it has authority under state law to acquire real and personal property or interests therein by sale, lease, permit, or otherwise for the purpose of carrying out requirements of the grazing agreement; 5) it has power to collect assessments or has other means to defray expenses of conducting business contemplated by the grazing agreement; 6) its charter or bylaws provide for one vote per member and prohibit voting by proxy. FSM 2232.1.

2. How are grazing associations established? What is the responsibility of a grazing association that has been issued a grazing agreement?

A grazing association is organized under state laws of incorporation and/or cooperatives and is considered to be a separate legal entity from its members who have limited liability for the debts and obligations of the association. Management and control of a grazing association is centralized in the board of directors and officers who are subject to certain fiduciary duties owed to the association and its members. Limits on the authority of the board of directors are usually spelled out in the articles of incorporation and bylaws. A January 21, 1983 memorandum from the Office of the General Counsel explaining the legal relationship between grazing associations and the Forest Service in greater detail is set out at Appendix L.

Forest Service regulations at 36 C.F.R. §222.7 authorize the agency to "recognize, cooperate with, and assist" local livestock associations in the administration of grazing on National Forest System lands. However, in order to be recognized, a grazing association must satisfy certain requirements set forth in the regulations. These regulations further specify that a grazing association must provide the means for its members to manage their permitted livestock, meet with Forest Service officials, work through the association to address their concerns and desires, share costs for handling livestock, construct and maintain range improvements, and other projects necessary for proper range management, and formulate special rules to ensure proper resource management. Many of the specifics

regarding how a grazing association is to interact with its members are spelled out in the "rules of management."

3. What are rules of management?

Rules of management are a set of policies, procedures, and practices, including eligibility requirements, which govern the grazing use both on public lands covered by the grazing agreement and private or State lands under the jurisdiction of the association. The association recommends rules of management which are approved by the Forest Service authorized officer. The rules of management are incorporated into and become a term and condition of the grazing agreement. Thus, violations of the rules of management are also considered as violations of the terms and conditions of the grazing agreement which may result in cancellation, suspension, or some other form of sanction. FSM 2232.05.

4. Are there any circumstances under which a rancher can lease base property and be eligible for a grazing permit on national grasslands?

Yes. Forest Service grazing regulations state in relevant part that

> **Except as provided for by the Chief, Forest Service,** paid term permits will be issued to persons who own livestock to be grazed and such base property as may be required…

36 C.F.R. 222.3(c)(1)(i) (emphasis supplied). In the chapter of the Forest Service's Grazing Permit Administration Handbook dealing with grazing agreements, the Chief has expressly provided that base property may be leased and that share livestock operations may be approved "under certain conditions." FSH 2309.13, ch. 23. These provisions were originally developed as a means to promote family ranching operations and to provide for new operators to become established in the ranching business. Today, they are most commonly employed to further one of these two objectives. It should be emphasized that this provision is discretionary and has generally been construed as a limited exception to the rule requiring that ranchers must own base property and livestock in order to be eligible for a grazing permit.

5. If a grazing association member waives a grazing permit, how is the permitted use allocated?

When a member of a grazing association waives a permit back to the grazing association, allocation of the waived permitted use is governed by the association's rules of management. Generally, a new permit would be issued by the grazing association to the party which acquires the base property from the association member who waived the permit. This is similar to Forest Service practice for term grazing permits.

6. Who is responsible for ensuring that the holder of an association grazing permit issued complies with the terms and conditions therein?

It is the responsibility of the grazing association to ensure that permittee complies with the terms and conditions of the grazing permits it issues. In those instances where a permittee violates the terms and conditions of the association permit, the association may cancel or suspend the permit or take some other form of permit action.

7. What recourse does the Forest Service have if a grazing association fails to take action or has taken inadequate action against a permittee who has violated the terms and conditions of his grazing permit?

The Forest Service may cancel, suspend, or modify the grazing agreement if a grazing association fails to properly enforce the terms and conditions of the permits it issues.

8. What process does the Forest Service use to modify the terms and conditions of grazing agreements?

Because a grazing agreement is a type of grazing permit, the Forest Service uses the same procedure to modify the terms and conditions of a grazing agreement as it does to modify the terms and conditions of a grazing permit. Grazing agreements may be modified to conform to current situations brought about by changes in law, regulation, executive order, development or revision of allotment management plan, or for other management needs. 36 C.F.R. §222.4(a)(7). The season of use, numbers, kind, and class of livestock, or the allotment specified in a grazing agreement may also be modified based on the permittee's request or due to resource conditions. Id. at §222.4(a)(8). However, modifications made

pursuant to 36 C.F.R. §222.4(a)(8) require one year's advance notice unless there is an emergency.

9. Must the Forest Service comply with the National Environmental Policy Act (NEPA) prior to issuing a grazing agreement?

Yes. Before a decision to authorize the use and occupancy of national grasslands for livestock grazing purposes can be made, the Forest Service must evaluate the environmental impacts of that decision pursuant to NEPA. An allotment management plan (AMP) is prepared based on the management direction in the decision to authorize grazing and becomes a term and condition of the grazing agreement. The grazing agreement and the AMP must comply with the authorizing decision. Generally, the issuance of a grazing agreement by the Forest Service merely implements a decision authorizing grazing that has previously been made.

10. Must the Forest Service comply with NEPA when it issues a new grazing agreement to replace a previous grazing agreement that has expired even though the terms and conditions of the two instruments are the same?

Yes. See B9 above.

11. What if the agency is unable to complete the environmental analysis required by NEPA before the grazing agreement expires?

Pursuant to Section 504 of the Rescission Act, P.L. 104-19, the Forest Service is required to issue a new grazing agreement to the holder of an expired or expiring grazing agreement if the only reason for not issuing the new agreement is due to the fact that the required environmental analysis has not been completed. In those instances, the agency must issue a new grazing agreement with the same terms and conditions as the expired grazing agreement. The terms and conditions may be modified by the Forest Service upon the completion of the environmental analysis. An October 4, 1995 letter from the Chief to the Regional Foresters explaining the effect of the Rescission Act on the grazing program is included at Appendix M.

12. May the Forest Service include private land within a national grassland as part of an allotment to be grazed under a Forest Service grazing permit?

Yes, provided that the landowner consents to the use of his or her land for such grazing purposes subject to the terms and conditions prescribed by the Forest Service. Grazing agreements, on-and-off grazing permits, and private land grazing permits are the only instruments issued by the Forest Service which recognize and authorize grazing on commingled federal and privately owned land.

In the event that the landowner does not consent to the use of his or her land for grazing purposes, the Forest Service may not include it as part of the allotment and cannot issue a permit authorizing grazing on it. This could lead to a debate over which party - the Forest Service, permittee, or private landowner - is responsible for ensuring that the permitted cattle do not stray from the permitted federal land onto the nearby private land which is not under permit. Though the answer may vary from state to state (or perhaps even within a state), in the West the general rule is that the state "open range" laws impose the burden on the private landowner to construct an exclosure if he or she does not want livestock to stray onto their private property.

13. May the Forest Service issue "exchange of uses" grazing permits to individuals who desire to graze cattle on their private land and adjacent federally owned national grassland?

No. In the past, exchange of use grazing permits were utilized where private lands were interspersed within a logical grazing allotment of National Forest System lands. Through an exchange of use permit, the landowner authorized the Forest Service to include his or her private property within the grazing allotment while the Forest Service authorized the landowner to graze on National Forest System lands elsewhere. Since such an arrangement was considered an even exchange, no fee was assessed to the landowner for grazing on the National Forest System lands. Exchange of use permits are no longer issued by the Forest Service. As noted above, where mixed land ownership patterns exist, the Forest Service may issue only grazing agreements, on-and-off grazing permits, and private land grazing permits. The type of permit that would be issued depends upon the facts of each case and the relative amount of federal and non-federal land within the area to be grazed.

14. Is the direction in a January 22, 1993 USDA memorandum which authorizes reductions in grazing fees of up to 50% in return for performance of conservation practices on national grasslands still in effect?

Yes. Conservation practices provide for the development of structural and non-structural improvements on the national grasslands which lessen the detrimental impacts of grazing. This program is similar to Range Betterment Fund (RBF) under FLPMA which authorized the establishment of a separate account in the Treasury into which 50% of all grazing fees are deposited. These monies are then returned to the forest for such activities as seeding and reseeding, fence construction, weed control, water development, and fish and wildlife enhancement. However, under FLPMA, the RBF only applies "on lands in National Forests in the sixteen contiguous Western States." 43 U.S.C. §1751(b)(1). Consequently, the RBF does not extend to national grasslands. Conservation practices are an alternative to the RBF and are permissible under the BJFTA. A copy of the January 22, 1993 USDA memorandum is included at Appendix N.

15. Is the direction in a January 22, 1993 USDA memorandum (see 13 above) which authorizes the allocation to administrative costs of up to 6% of the 50% reduction in grazing fees associated with the implementation of conservation practices on national grasslands still in effect?

Yes. However, it is important to clarify that the 6% figure pertains only to the administrative costs associated with the implementation of conservation practices on the national grasslands. Therefore, of the 50% reduction in grazing fees which may be authorized in return for the implementation of conservation practices, 6% of that amount may be allocated to administrative costs. This does not apply to other routine business expenses incurred by a grazing association in conjunction with its administration of the grazing permits it issues pursuant to a grazing agreement. These are referred to as "administrative practices" which are different from "conservation practices" and were not covered in the subject memorandum.

C. Acquisition, Disposal, and Other Conveyances of National Grasslands

1. May the Forest Service enter into land exchanges involving national grasslands under the BJFTA and, if so, what limitations apply?

   Yes. Section 32(c) of Title III authorizes the Secretary to "sell, exchange, lease, or otherwise dispose of, with or without a consideration, any property [] acquired" under the Act. 7 U.S.C. §1011(c). Under the BJFTA, land exchanges with public agencies may only occur if the public agency agrees to use the land for a public purpose. Additionally, land exchanges with private individuals may only occur if the exchange does not conflict with the purposes of the Act and if the value of the property received is substantially equal to the value of the property conveyed. Id.

   In addition, the exchange provisions of Section 206 of FLPMA and Section 17 of NFMA should be considered when proceeding with an exchange involving national grasslands.

2. May the Forest Service sell national grasslands and, if so, what limitations apply?

   Yes. Section 32(c) of Title III authorizes the Secretary to "sell, exchange, lease, or otherwise dispose of, with or without a consideration, any property [] acquired" under the Act. 7 U.S.C. §1011(c). Under the BJFTA, sales, exchanges, or grants may be made "only to public authorities and agencies and only on condition that the property is used for public purposes." 7 U.S.C. §1011(c). While this provision of the BJFTA authorizes land exchanges with private individuals under certain conditions, it does not authorize outright sales of national grasslands to private parties.

   However, limited authority for the sale of small parcels of national grasslands for land adjustment purposes may exist under the Small Tracts Act, 16 U.S.C. §§521c et seq. In addition, if property is deemed "surplus," it may be subject to disposal pursuant to the Federal Property and Administrative Services Act of 1949, 40 U.S.C. §§471 et seq. Finally, Section 206 of the Federal Land and Policy Management Act (FLPMA), 43 U.S.C. §1716, also provides independent authority for the exchange of National Forest System lands (including national grasslands) under certain circumstances.

3. Was the intent of BJFTA to dispose of the acquired lands after they have been stabilized?

There is no indication in the BJFTA or its legislative history to suggest that Congress intended the Secretary to dispose of the lands acquired once they had been stabilized. However, given that the BJFTA authorized the sale, exchange, or grant of acquired land only to public authorities and only on the condition that the land be used for public purposes, it is logical to presume that regardless of whether the land was retained by the Secretary of Agriculture or was transferred to another federal or state agency, the clear intention was to retain these acquired lands in public ownership.

4. Do the public uses for which lands were acquired through condemnation under the BJFTA and the previous authorities continue to prescribe the current legitimate uses of the national grasslands today?

No. In order to exercise the condemnation authority delegated by Congress, the Secretary must demonstrate that the land to be acquired will be applied to a "public use." 40 U.S.C. §§257, 258a. In general, the term covers a use affecting the public generally, or any part thereof, as distinguished from particular individuals. No set definition of what degree of public good will meet the requirement of a "public use" exists since in each case it is a question of public policy which depends on the facts and circumstances of a particular case. However, the meaning of the term is flexible and is not confined to what may constitute a public use at any given time. The term must be applied in the light of what the legislature seeks to accomplish and what it may properly consider to be a public use at the time.

Thus, the fact that lands now comprising national grasslands may have been originally purchased in order to establish a "demonstrational area for the public grazing of livestock" is significant in that it proves that the land was acquired for a "public use" and that the Secretary thus had the authority to acquire it through condemnation. It does not obligate the Forest Service, however, to maintain that use in perpetuity. The appropriate mix of permissible uses of the national grasslands must be determined by the Forest Service in accordance with the applicable statutory and regulatory authorities taking into account the condition of the grassland resources. This is reinforced by NFMA's inclusion of grasslands in the National Forest System multiple use framework. Clearly, it would be an incongruous

result if the Forest Service was required to perpetuate a specific use on a parcel of land based on the manner in which it was acquired many years ago even if the resources were inadequate or if there was no longer any interest in such a use.

5. What mechanisms are available to resolve title claim disputes or encroachment problems on the national grasslands?

Most disputes concerning title to land or interests therein involving the United States are adjudicated in federal court under the Quiet Title Act (QTA). 28 U.S.C. §2409a. Under the QTA, suits may be brought against the United States within 12 years from the date the party knew or should have known that the United States was asserting ownership of the land or interests it purports to own. Although it may not initiate litigation under the QTA, the United States may bring an action in federal court under various state law causes of action like trespass. The party initiating litigation under the QTA must describe in detail the interest claimed, the basis for the claim, and the nature of the United States' interest in the subject property.

Another, albeit more limited, option to resolve certain types of title disputes administratively is found in the Adjustment of Land Titles Act. 7 U.S.C. §2253. This statute was enacted by Congress in 1943 as Public Law 78-120 and is commonly referred to as "PL-120." Under PL-120, the regional forester may issue a quitclaim deed to a landowner to resolve a title dispute. PL-120 may only be used in connection with acquired lands and only under a very limited set of circumstances where the United States' title claim appears to encroach upon an adjacent landowner's title claim. The regional forester must obtain a legal opinion from the regional attorney for OGC which acknowledges that the use of ALTA is appropriate in a particular case.

PL-120 may only be used to resolve title claim disputes which may arise if the title to the acquired land is deemed insufficient or if it was acquired as a result of error or inadvertence. Examples of situations where the use of PL-120 might be appropriate include the following: 1) a landowner has satisfied the adverse possession laws of the state where the property is located at the time of United States' acquisition of the land but is not identified as an owner of record; 2) a landowner and the United States hold separate deeds with

overlapping land descriptions; 3) the property boundary between the landowner and the United States is inaccurate because the land was either not surveyed or was improperly surveyed; or 4) there may be an erroneous deed in which the claim of the landowner is superior to the claim of the party which sold the land to the United States. Generally, these are the only types of title claim disputes which may be resolved under PL-120.

D. Miscellaneous

1. Are oil, gas, and coal development activities prohibited on national grasslands based on the provision in the BJFTA which reads "but not to build industrial parks or establish private industrial or commercial enterprises?"

No. The subject clause was added to Section 31 of Title III in the Food and Agriculture Act of 1962, P.L. 87-703. In response to an inquiry in 1973, the Office of the General Counsel issued an opinion stating that this clause did not constrain development of oil, gas, and coal resources on Title III lands provided that the activities did not involve the construction of power plants or other commercial enterprises to consume or utilize the minerals extracted. A copy of this OGC opinion is set out in Appendix O.

In 1981, Congress amended Section 31 again to expressly recognize "developing energy resources" as one of the purposes for which Title III lands could be administered. This amendment further buttressed the argument that oil, gas, and coal development and leasing is a legitimate use of Title III lands.

2. Under what laws may the Forest Service authorize the development of roads across national grasslands?

Generally speaking, until 1976 the BJFTA was the primary source of the Forest Service's authority to approve of the development of roads across national grasslands. Section 32(d) of the Act authorized the Secretary to "make dedications or grants, in his discretion, for any public purpose, and to grant licenses and easements upon such terms as he deems reasonable."

In 1976, however, Congress enacted the Federal Land Policy and Management Act (FLPMA). P.L. 94-579 (codified at 43 U.S.C. §§1701 et seq.). Section 501 of FLPMA

authorized the Secretary to "grant, issue, or renew rights of way over, upon, under or through National Forest System lands for roads, trails, and highways among other things. In Section 706 of FLPMA, Congress repealed all the other federal laws (including Section 32(d) of the BJFTA) under which rights of way could previously have been secured. FLPMA, did not, however, terminate any rights of way which had been previously established under the repealed statutes. Consequently, rights of way on national grasslands which had been established under the BJFTA prior to the enactment of FLPMA in 1976 remained valid. In Title V of FLPMA are listed some of the general terms and conditions that apply to the issuance of rights of way.

Roads on national grasslands may also be authorized and developed in accordance with the National Forest Road and Trail Act, 16 U.S.C. §§532 et seq., and the Department of Transportation Act, 23 U.S.C. §317.

Of course, any actions concerning the development of roads on national grasslands would be subject to, among other things, the National Environmental Policy Act (NEPA), 42 U.S.C. §§4321 et seq., the National Forest Management Act (NFMA), 16 U.S.C. §§1600 et seq., and the Endangered Species Act (ESA), 16 U.S.C. §§1531 et seq., Section 4(f) of the Department of Transportation Act of 1966, 23 U.S.C. §138, and the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. §1323(a).

Finally, roads that predated the establishment of a national grassland may be deemed an outstanding right and would not require any authorization from the Forest Service provided that the activities occurring thereon were within the scope of the original right. In the event activities were outside of the scope of the original right, authorization under FLPMA would be necessary. Examples of activities outside scope of the right might be expanding a road from two to four lanes, paving a gravel road, or changing the road's alignment.

It should also be noted that some Great Plains states have enacted statutes which establish “section line” roads or highways. See, e.g., N.D. Cent. Code §24-07-03; Neb. Rev. Stat. §39-1410; S.D. Codified Laws Ann. §§31-18-1 et seq. In these states, the land on either side of a section line is burdened with an easement in favor of the public for highway purposes and are generally under the jurisdiction of a local unit of government. Thorough

investigation of the applicable state law should be conducted with the assistance of OGC prior to engaging in any activity which could arguably interfere with a purported section line highway easement.

3. May fees collected for special use permits, grazing permits, mineral leases, etc, be used to fund conservation practices on the grasslands?

No. Federal law requires that any money received by a government official or employee in the course and scope of the performance of his job must be deposited in the Treasury without deduction for any charge or claim. This would apply to fees collected from national grasslands. Furthermore, the diversion of such funds could constitute an unauthorized augmentation of appropriations. Through the appropriations process, Congress not only provides funds to administer programs but also establishes the level at which these programs are intended to operate. Utilizing funds from a source other than Congress would enable an agency to increase its program level without congressional approval.

4. May fees due from special use permits, grazing permits, mineral leases, etc. be reduced in return for the performance of conservation practices on the national grasslands?

Yes. Though similar, there is a subtle distinction from the previous question because it does not result in funds being transferred from a permittee to the Forest Service which would normally necessitate a deposit in the Treasury. Rather it involves situations in which the Forest Service agrees to charge a permittee a reduced rate in return for an agreement by the permittee to engage in certain specified conservation practices. The authority for this is located in Section 32(c) of the Act which authorizes the Secretary "[t]o sell,exchange, lease, or otherwise dispose of, **with or without consideration,** any property [acquired under the BJFTA]. . ." (emphasis supplied). The highlighted language authorizes the assessment of fees for the use of national grasslands but it also authorizes the assessment of no fees if the Secretary deems it appropriate. Obviously, within these limits, there is wide discretion to assess a reduced fee. This authority was previously considered in a decision by the Comptroller General from 1950. B-77467 (Nov. 8, 1950). A copy of the subject Comptroller General opinion and a more recent opinion from the Office of the General Counsel on this matter is set out at Appendix P.

While the authority exists, however, we believe that there are some limitations inherent in its use. The most important of these is that there should be some nexus between the permitted use of the grassland and the conservation practice that would justify a reduction in the fee imposed for the use. The 1992 OGC memorandum on this subject addressed this matter by stating that

> It is not possible to define in this memorandum the limits of the Forest Service's authority to allow for the off site expenditures by the permittee or lessee for conservation projects elsewhere on a national grassland. Suffice to say that the more remote the nexus or connection between the expenditure for off site activities and the conservation objectives for the land under permit, the more likely such conditions might be deemed void as arbitrary and capricious. An extreme case might be a requirement that the permittee construct and pave a road in an adjacent county in return for rights to graze cattle. In such a case, it would be highly unlikely the Forest Service could establish that the condition of the permit (i.e. road construction in an adjacent county) bears any relation to the management objectives for the land being permitted.

5. <u>May the Forest Service collect money from the purchasers of timber on national grasslands pursuant to the Knutson-Vandenberg Act (the KV Act) and the Act of August 11, 1916 (the 1916 Act)?</u>

Yes. The Forest Service is authorized to require timber purchasers to deposit certain sums into a special fund in accordance with the KV Act, 16 U.S.C. 576 et seq., which was enacted in 1930 and the 1916 Act, 16 U.S.C. 490. It should be noted that both of these laws were enacted prior to the enactment of the BJFTA. Consequently, these statutes refer to purchasers of timber on "national forest" land rather than on "national grasslands" or "National Forest System" land. Nonetheless, we believe that after 1974 when Congress defined the term "National Forest System" to include, among other things, national grasslands, the objective was to make the laws applicable to national forests extend wherever practicable to all lands administered by the Forest Service.

However, it should be pointed out that the sums collected under these two authorities may only be used in accordance with the terms of the statute authorizing the collection. Thus, funds collected under the KV Act may be used to cover the cost to the United States of planting, sowing, removing undesirable trees, and protecting and improving the future productivity of the renewable resources of the land where the timber sale is located. Under

the 1916 Act, the funds collected may only be used to cover the cost to the Forest Service associated with the disposal of brush and other debris resulting from the timber harvest activities.

V. SUMMARY

The Forest Service currently administers 3.8 million acres of national grasslands as part of the 191 million acre National Forest System. These lands were originally acquired under the authority of Title III of the Bankhead-Jones Farm Tenant Act of 1937 and were assigned to the Forest Service for administration in 1954. In the Forest and Rangeland Renewable Resources Planning Act of 1974, Congress specifically included national grasslands as a unit of the "National Forest System." National grasslands therefore are subject not just to the requirements of the BJFTA but also to the requirements of other laws generally applicable to the rest of the National Forest System. Although the revelation that national grasslands are subject to the BJFTA and other laws applicable to the National Forest System may not seem especially startling, it should help to dispel certain myths that have been perpetuated over the years about which laws apply to national grasslands and how those laws should be interpreted.

The first myth is that the only law which the Forest Service should consider in its administration of national grasslands is the BJFTA. This is plainly incorrect. The Forest Service must consider the BJFTA but it must equally consider other laws applicable to units of the National Forest System. Until there is a conflict between the requirements of the BJFTA and one or more of these other laws, the Forest Service is obliged to manage the national grasslands in conformance with all of the applicable laws. To date, no such conflict has manifested itself.

The second myth is that the BJFTA established livestock grazing as the preferred or dominant use of the national grasslands. This too is plainly incorrect. There is simply nothing in the BJFTA, its preamble or legislative history to corroborate such an assertion. Grazing has been and will continue to be an important use of the national grasslands. But it is just one of many recognized uses and it is within the discretion of the Forest Service to determine through the planning process how those uses should be managed and where they should occur.

Fortunately, the combination of events which led to the enactment of the BJFTA are not likely to be repeated and the lands acquired under Title III in the 1930's and 1940's have made a remarkable recovery. In large part, the recovery of the land was due to the concerted and

cooperative efforts of many people from different backgrounds working together towards a common goal. While the national grasslands have, for the most part, been restored, challenges remain for the Forest Service in its administration of these areas.

Today, the challenges are different. The Forest Service must be able to identify, consider, and harmonize all the applicable laws, not just the BJFTA, in its administration of the national grasslands. The Forest Service must educate the public about national grasslands, solicit their input and consider their views as part of the decisionmaking process. And ultimately, the Forest Service must make management decisions which are in compliance with the law and which provide for the wise use and sustained productivity of the grassland resources. This process takes time and can often be frustrating. But it is what the law requires. And it is what the public has a right to expect.

VI. APPENDICES

A. Report of the National Grasslands Management Review Team (Dec. 1995).

B. National Grasslands Management Review Action Plan (May 1996).

C. Wooten, The Land Utilization Program 1934 to 1964 - Origin, Development, and Present Status, Agriculture Economic Report No. 85 (1964).

D. Hurt, "The National Grasslands: Origin and Development in the Dust Bowl," in The History of Soil and Water Conservation, Agricultural History Society at 144-156 (1985).

E. Agency Heads et al. Delegation of Authority and Assignment of Functions, 19 Fed. Reg. 74 (Jan. 6, 1954).

F. Part 213 - Administration of Lands Under Title III of the Bankhead-Jones Farm Tenant Act by the Forest Service, 25 Fed. Reg. 5845 (June 24, 1960).

G. The Bankhead-Jones Farm Tenant Act, P.L. 75-210, 50 Stat. 522.

H. Con. Rep. No. 1198, 75th Cong., 1st Sess. (1937); 81 Cong. Rec. H6450-6489 (June 28, 1937); 81 Cong. Rec. H6533-6581 (June 29, 1937); 81 Cong. Rec. H 7133-7140 (July 13, 1937); 81 Cong. Rec. S7158-7162 (July 15, 1937); Legislative History, Public Law 210, 75th Cong.

I. Office of the Solicitor, United States Department of Agriculture, "Legislative History of Land Utilization Provisions in the Farm Tenancy Bill."

J. Bankhead-Jones Farm Tenant Act, as amended, 7 U.S.C. §§1010 - 1012 (1997).

K. Administration of Lands Under Title III of the BJFTA by the Forest Service, 36 C.F.R. §§213 et seq. (1996).

L. Office of the General Counsel Memorandum on Description of Legal Relationship Between Grazing Associations and the Forest Service (Jan. 21, 1983).

M. Letter from the Chief to Regional Foresters on P.L. 104-19 (Oct. 4, 1995)

N. Secretary of Agriculture Memorandum on National Grassland Grazing Fees (Jan. 22, 1993).

O. Office of the General Counsel Memorandum regarding Mineral Development on National Grasslands (Apr. 25, 1973).

P. Comp. Gen. B-77467 (Nov. 8, 1950); Office of the General Counsel Memorandum on Use of Fees from National Grasslands (Sept. 9, 1992).