

this practice “authorized temporary nonuse” and can allow it for purposes of conservation and protection of the public lands, or for reasons associated with business or personal needs of the permittee. The current regulation limits authorized temporary nonuse to 3 consecutive years, after which the permittees must graze as much as they are authorized in their permit or risk losing the unused portion.

The 3 consecutive year temporary nonuse limitation rule was intended to work in conjunction with the regulation that provided for conservation use permits. For example, if the permittee wanted authorized temporary nonuse for more than 3 consecutive years, and BLM agreed that continuing not to graze the allotment(s) was necessary to protect or enhance resources, BLM could replace his “regular” permit with a conservation use permit. However, because of the 10th Circuit Court decision, we no longer have that option, and BLM is limited to issuing “regular” permits only. The current regulations limit authorized temporary nonuse to 3 consecutive years. Therefore, BLM must require permit holders to use the grazing permit at the end of the 3 years even if both the permittee and BLM wish to continue the nonuse for resource stewardship purposes. BLM proposes not to require grazing use of a permit when both the BLM and permittee agree that temporary nonuse is needed for resource stewardship reasons. Although we propose to remove the 3-consecutive-year limitation on authorized nonuse if the purpose of the nonuse is for resource stewardship reasons, we realize that some may wish to acquire a permit and not use it indefinitely, despite the 10th Circuit Court’s decision that BLM cannot issue grazing permits not to graze. Where land use plans provide that an acceptable use of the public lands is domestic livestock grazing, then BLM will manage those lands for grazing in accordance with the land use plan.

Failing to “make substantial grazing use as authorized for two consecutive fee years” is prohibited under current grazing regulations. BLM does not propose to amend this provision in this rule. BLM may deny nonuse of a permit if the permittee cannot justify that nonuse is for resource stewardship or personal or business reasons. If BLM denies nonuse, and the permittee does not graze livestock as allowed under the permit for two years in a row, the permit or portion of the permit that is not used is subject to cancellation and would be available for awarding to another applicant. (These same principles pertain to leases.) The changes to

nonuse provisions that BLM is proposing today would provide that BLM could authorize nonuse for no longer than one year at a time, but could repeat such annual authorizations for more than 3 consecutive years.

We considered many of the substantive issues that were raised during the scoping period and have incorporated several of these as alternatives in the draft EIS. We did not address, however, some of the issues that commenters raised because they are either beyond the scope of the document, did not meet the basic purposes of these proposed changes to the regulations, or BLM decided we could better address the issues through policy.

The following are issues we considered but do not address in this proposed rule:

- Increasing grazing fees and restructuring grazing based on market demand are outside the scope of this proposed rule.
- Reestablishing BLM grazing advisory boards to provide local advice and recommendations to BLM on grazing issues is not addressed because BLM grazing advisory boards were “sunset” on December 31, 1985, by FLPMA. This proposed rulemaking, however, would provide that BLM cooperate with state, county or locally established grazing boards in reviewing range improvements and allotment management plans on public lands. This review would supplement the counsel of Resource Advisory Councils that BLM established in 1995 to advise BLM and recommend strategies for managing public lands under our multiple-use mandate.
- Modifying management of wild horses and burros or making any changes to The Wild Horse and Burro Act or its implementing regulations are outside the authority and scope of this proposed rule. Issues involving allocation of forage are addressed in land use plans.
- Counting 7 sheep, rather than the current 5, as the equivalent of one animal unit for the purposes of calculating grazing fee billings are not addressed because matters involving the grazing fee are outside the scope of this proposed rule.
- Establishing and managing Reserve Common Allotments is not addressed in this proposed rule. In the ANPR, BLM stated that we were considering proposing provisions to define, establish a regulatory framework, and otherwise support the creation of Reserve Common Allotments. BLM has decided not to proceed with developing Reserve Common Allotments at this time.

During BLM’s public scoping period many commenters expressed concern about adding special provisions for Reserve Common Allotments in the grazing regulations. Many commenters said they did not think such regulatory provisions were warranted. Ranching interests indicated they would rather have “normal” allotments while environmental interests questioned whether this would be the best use of the land. After considering the reception to this concept, BLM determined it was not in the public interest to proceed with this provision through regulations. BLM will continue to examine the concept of forage reserves through policy-making processes.

- Removing the grazing fee surcharge is not addressed in this proposed rule. The 1995 regulations added a grazing fee surcharge to address the concerns raised by the General Accounting Office and Office of the Inspector General regarding the potential for rancher “windfall profits” arising from BLM’s practice of allowing for the subleasing of public land grazing privileges. Some BLM grazing permittees enter pasturing agreements allowing them to take temporary control of a third party’s livestock and graze them under their permit or lease. The permittee pays the federal grazing fee and charges the third party an amount negotiated between them for the forage and care of the livestock. BLM assesses a fee surcharge in this circumstance that equals 35 percent of the difference between the current Federal grazing fee and private grazing land lease rates with one exception. BLM does not assess the surcharge when the livestock that are grazed under the permit or lease under a pasturing agreement belong to children of the permittee or lessee under certain circumstances set out under section 4130.7(f). BLM is not proposing to alter the existing surcharges for the following reasons:

1. BLM continues to believe that the surcharge is an equitable manner in which to address the issue of potential windfall profits to BLM permittees and lessees who choose to enter into pasturing agreements, and

2. BLM does not want to open issues related to grazing fees at this time.

- Assigning burden of proof to the BLM for appeals is not addressed in this proposed rule. BLM considered including a provision in the proposed rule requiring the BLM to assume the burden of proof for all appeals before the Office of Hearings and Appeals. The burden of proof has been clarified by the Supreme Court to mean the “burden of persuasion” which refers to “the notion that if evidence is evenly balanced, the