

U. S. Forest Service, Director, Forest Management, Range Management and Vegetation Ecology
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Via Federal eRulemaking portal at:
<http://www.regulations.gov>.

December 1, 2020

Dear Forest Service,

The following are the comments of the undersigned on the proposed modification of the rule for assessing fees for excess and unauthorized grazing (36 CFR 222.50), as described in the Federal Register of November 2, 2020, 85 Fed Reg 69303 et seq. The endorsers of this letter are all organizations and individuals who use and monitor national forest policies, plans, and projects, including those involving livestock grazing. We are very concerned with the proposed rule.

INTRODUCTION

In discussing livestock grazing on federal lands, it is very important to remember that livestock of almost any kind, but especially cattle and sheep, the animals most commonly grazed, are non-native species that did not evolve with the land. That is, they are not adapted to the climate, plant species, topography, and other features of national forests. Rather, they were native to other areas and brought in by humans for economic reasons.

As such, these animals, if not properly managed, are capable of doing a great deal of damage to: soils; water quality; watershed integrity; habitat for native wildlife, fish, and plant species; recreational opportunity; scenery; and other resources. The damage that can result from inadequately regulated livestock grazing is well documented. See, e. g., Beschta et al, 2013.

The Government Accountability Office's (GAO) study on unauthorized grazing even stated:

Agency field staff told us that unauthorized grazing can severely degrade the range under certain conditions, such as drought, and also told us of other effects, such as creating conflicts between the agencies' staff, ranchers, and other stakeholders.

GAO, 2016¹, at 12; see also *id.* at 15-16. The report states that “unauthorized grazing can be more damaging than permitted grazing, such as when livestock are allowed into closed riparian areas...”. And it can also generate conflicts with permittees, who are understandably angry when illegal grazing results in less forage for their legally permitted animals. See *id.* at 19.

Thus, careful and diligent regulation of livestock grazing on national forests is extremely important for protecting other multiple uses. It must not be tolerated, let alone encouraged, in areas where it is prohibited, whether such prohibitions are temporary or permanent.

¹ The Fed Reg notice for this rulemaking cites this study. See preamble at 69304.

UNAUTHORIZED AND EXCESS GRAZING MUST BE MONITORED

Livestock grazing is an activity that occurs on all western national forests, generally on significant parts of each unit. With forage available and private lands adjacent to national forests and grasslands, there is ample opportunity for trespass grazing and other unauthorized grazing.

But in spite of this and the obvious need to carefully regulate livestock grazing, it is clear that the Forest Service, unconscionably, does not consider excess or unauthorized grazing to be important:

agency staff told GAO that they handle most incidents informally—their preferred practice—and do not record them in databases or consistently in paper files, because, in part, they do not consider it a priority.

GAO, 2016, at unnumbered page in summary; see also *id.* at 12, 14-15. GAO concluded that the Forest Service “may not have the documentation needed to deal with any instances of repeat offenders appropriately”. *Id.* at 14-15.

Given that unauthorized grazing represents theft of government property, it should be a very high priority for the agency to investigate every incident for which there is credible information indicating excess use or other unauthorized grazing may have occurred, or is about to occur, and to keep full, accurate, and up-to-date records on all such incidents.

At a bare minimum, the agency should keep track of incidents by each entity grazing livestock on national forests and/or grasslands to see if there is a pattern – does a permittee or non-permittee frequently graze animals for which s/he is not authorized to do so? If so, *i. e.*, if there are frequent, repeated, or persistent violations, special attention should be applied, and penalties should be more severe, as opposed to a one-time incident of a small number of animals wandering off and grazing outside the permitted area for a very short time.

It would also be good to compile and update statistics on unauthorized grazing across districts, national forest units and regions, to see how big of a problem this is.

THE PENALTY FOR EXCESS AND UNAUTHORIZED GRAZING MUST BE ADEQUATE TO DETER SUCH ACTIVITY

Notably, the GAO stated that

most of the Forest Service staff GAO interviewed said that unauthorized grazing penalties are too low to act as an effective deterrent. ...By adopting an unauthorized grazing penalty structure that is, like BLM’s, based on the current price of private forage, the Forest Service’s unauthorized grazing penalty can better serve as a deterrent to such grazing.

GAO id. at unnumbered page in summary. The GAO's report further states that current penalties do not appear to be effective in discouraging unauthorized grazing. See id. at 23-26.

But even with a lack of knowledge about how much unauthorized grazing is occurring on the lands under its jurisdiction, and a strong indication that current penalties are too low to discourage this activity, the agency proposes to make it even easier for it to occur by reducing the rate for use of unauthorized forage. The proposed rule would revise 36 CFR 220.50(h) to read, in part, as follows:

The excess and unauthorized grazing use rate will be determined by establishing a base value without giving consideration for those contributions normally made by the permittee under terms of the grazing permit.

This is outrageous! Why should the permittee whose stock have used forage he was not entitled to have them use pay any less for that forage than s/he would under the permit, i. e., if the grazing had been allowed under the permit? From the language in the preamble, it appears the intent is to allow the Forest Service officer to reduce the rate for use of unauthorized or excess forage below that established by the permit, possibly even to zero, in order to allow "nonmonetary settlement[s] of infraction". See preamble at 69304. In other words, the proposed modified rule would allow violators to walk away with no penalty.²

This would violate another section of the agency's regulations addressing grazing:

Fees shall be charged for all livestock grazing or livestock use of National Forest system lands, or other lands under Forest Service control.

36 CFR 222.50(a).³ It would also violate the following:

Unless otherwise specified by the Chief, Forest Service, all grazing and livestock use on National Forest System lands and on other lands under Forest Service control must be authorized by a grazing or livestock use permit.

36 CFR 222.3(a).

The GAO recommended that the Forest Service

adopt an unauthorized grazing penalty structure that is based, similar to BLM's, on the current commercial value of forage.

² The proposed rule states that the rate (if any) charged for excess/unauthorized forage consumption "is separate from any penalties that may be assessed for a violation of a prohibition issued under 36 CFR part 261 or from an administrative permit action." However, it is quite difficult to imagine that the Forest Service would charge a penalty for a violation when it did not even charge the going rate, if any, for unauthorized use of the forage.

³Free use of forage is allowed in a few circumstances under 222.3(c)(2)(ii) which is excepted from this requirement, but that is not at issue in the proposed rulemaking.

GAO, 2016, at 32.

But under the proposed rule, nonmonetary settlements would be allowed

when all of the following conditions are satisfied:

- (1) The excess or unauthorized use was non-willful on behalf of the permittee or non-permittee;
- (2) The forage consumed by the excess or unauthorized use is not significant;
- (3) National Forest System lands have not been damaged significantly by the excess or unauthorized use; and
- (4) Nonmonetary settlement is in the interest of the United States.

In general, nonmonetary settlement is not in the interest of the United States for more than inadvertent and trivial uses of forage that was not allowed under the applicable permit. And even in these cases, the agency's officers must require the permittee to take actions to ensure that such violations will not be repeated.

For other violations, "significant" forage consumption and national forest lands "damaged significantly" are not defined, nor does the rule describe how the agency would determine significance in these situations.

A proposed addition to the definitions at 36 CFR 222.1(b) states that "non-willful means an action which is inadvertent or accidental, and not due to gross negligence". But chances are that most violations involve some negligence on the part of the permittee. Legal livestock operators have a permit which clearly specifies what, where, when, and for how long a certain number of animals can graze a given area. It is the permittee's responsibility to control the stock at all times. Thus even if a violation is not considered to be "willful" or the result of "gross negligence", the operator is still responsible.

And most importantly, even for a violation leading to unauthorized grazing use that is totally not the fault of the operator, s/he must still pay for all of the forage so consumed. The operator has received a benefit, and s/he must be required to pay for it. Otherwise, it is theft of public property. Allowing this theft would encourage other unscrupulous operators to illegally graze their stock. It would also be unfair to permittees who faithfully comply with their respective permits.

THE FOREST SERVICE MUST PROTECT NATIONAL FOREST RESOURCES, REGARDLESS OF POLICIES AND IMPLEMENTATION ON BLM LANDS

The proposed rule states that its language is consistent with the language used by BLM to describe non-willful grazing use. Preamble at Reg 69304. The BLM tends, according to some

observers, to be rather lax in enforcement of grazing violations. (Hence the sarcastic nickname for the BLM among some observers, “Bureau of Livestock and Minerals”). The Forest Service should quickly and appropriately address grazing violations, regardless of what the BLM does.

And note from the GAO that the BLM has a much better-defined structure for charging fees for unauthorized grazing than the Forest Service does, resulting in much higher charges for illegal use. See GAO, 2016, at 23-26.⁴ If the Forest Service wants to be consistent with the BLM, it should start there.

CONCLUSION

The proposed rule modification is not acceptable. It would encourage new and continued excess and unauthorized forage use by allowing livestock permittees and non-permittees to escape penalties in at least some poorly defined circumstances. Violators would not have to even pay for the excess or unauthorized forage their animals used. Such unpenalized use would thus be rewarded and constitute theft of public resources.

Instead, the rule at 36 CFR 222.50 needs to be strengthened to require national forest units to: take excess and unauthorized grazing allegations and incidents seriously; investigate, record, and respond to all such incidents; and at a minimum, require all violators to pay for all the forage they used at the going rate.

Please be sure to inform us when any further action is taken on the proposed rule.

Sincerely,

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⁴ The Forest Service’s charges for unauthorized grazing are sometimes so low they calculate out to a value less than zero. Ibid.

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